# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 39

BROOKLYN EASTERN DISTRICT TERMINAL,
PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 15, 1932

CERTIORARI GRANTED MAY 23, 1932

(36,691)

# (36,691)

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**IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

BROOKLYN EASTERN DISTRICT TERMINAL, Libellant,

against

UNITED STATES OF AMERICA, Respondent

UNITED STATES OF AMERICA, Cross-Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Cross-Respondent

STATEMENT

1925.
May 7. Libel filed.
August 13. Answer filed.
August 13. Cross libel filed.
1927.
March 17. Answer to cross libel filed.
April 18-19. Trial before Bondy, J.
1929.
January 24. Opinion filed.
February 4. Interlocutory decree filed.
September 27. Hearing before Special Commissioner.
1930.
April 18. Hearing before Special Commissioner.

[fol. 2]

June 19. Hearing before Special Commissioner.
July 11. Hearing before Special Commissioner.
July 22. Hearing before Special Commissioner.
August 8. Report of Special Commissioner filed.
August 9. Exceptions to report of Special Commissioner.
September 16. Opinion of Caffey, J., overruling exceptions filed.
September 26. Final decree entered.
December 24. Notice of appeal filed.
December 24. Assignment of errors filed.
1931.
April 2. Stipulation withdrawing assignments of error, Nos. 1 to 9, inclusive, filed.

IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of Brooklyn Eastern District Terminal, as owner of the steamtug Integrity, against United States of America, as owner of the hopper dredge Raritan, in a cause of collision, civil and maritime, on information and belief alleges and respectfully shows to this honorable Court as follows:

First. Your libellant was at and during all of the times hereinafter mentioned a domestic corporation duly created, organized and existing under and by virtue of the laws of the State of New York, engaged, among other things, in the business of transportation by water for hire in and about [fol. 3] the harbor of New York and elsewhere, having its principal office for the regular transaction of business within this District, and was the owner of the steamtug Integrity, which prior to and up to the time of the collision hereinafter described was tight, staunch, strong and in all respects seaworthy and properly manned and equipped.

Second. At and during all the times hereinafter mentioned the United States of America, a corporation sovereign, was the owner of the hopper dredge Raritan and said dredge at the time of the collision hereinafter referred to was controlled and operated by it as a public vessel.

Third. On the 30th day of September, 1920, about 1 P. M., the steamtug Integrity left St. George, Staten Island, New York, with carfloat New York Central No. 61 in tow, made fast on the starboard side of the tug, proceeding up the bay on a course a little to the east of the center of the channel. The weather was clear but there was a strong southeast wind which caused the tug and tow to make leeway. There was a considerable sea for this part of the harbor. While proceeding on this course those in charge of the tug observed the hopper dredge Raritan about ahead, headed down the bay in the opposite direction. Signals of one blast were exchanged. The helm of the tug was ported and her heading changed to starboard, but the

Raritan continued to head directly for the Integrity. The Integrity again blew one blast, which was again answered by one blast from the Raritan. The Integrity got as far [fol. 4] to starboard as it was possible for her to do, but no change in course was made on the part of the Raritan. When the Raritan had gotten within such a short distance of the tug and tow that a collision was inevitable, the Raritan blew an alarm signal. The Integrity answered with an alarm signal and the engines of the tug were stopped. The Raritan struck the Integrity on her port bow and the Integrity was badly damaged and her towing lines were parted. By the force of the collision one of the crew of the tug, a fireman named Frank Rundell, was thrown into the water and drowned.

Fourth. As a result of the aforesaid collision carfloat No. 61, laden with cars and valuable freight for which your libellant was responsible as bailee and common carrier, were set adrift. The tug Integrity was disabled as a result of the collision and was unable to assist float No. 61 or the cargo. Float No. 61 was without motive power and helpless and in a position of considerable danger exposed to the elements and there was serious danger that the float and the cars and contents would be seriously damaged or lost. Under these circumstances assistance was rendered to float No. 61 and the cars and contents thereof by the steamtugs Agnes and James Kay and their masters, officers and crews as a result of which float No. 61 and the cars and cargo were rescued from a position of peril and brought to a safe berth at Governor's Stores, South Brooklyn. Thereafter, a libel was filed by Seaman Green, owner of the barge Agnes, and Margaret Kirwin, owner of the tug James Kay, for themselves as owner and on behalf [fol. 5] of the masters and crews of said steamtugs against the carfloat No. 61 and the cars and cargo laden thereon claiming compensation for salvage service. As a result thereof libellant has been required to pay and has paid to said libellants in satisfaction of said claim for salvage the sum of $1,250 and in addition has necessarily incurred legal expense in connection with the defense of the said salvage suit and by reason thereof has sustained damage.

Fifth. That subsequent to the date of the above collision a suit was filed in the Supreme Court, State of New York,

for the County of Kings, by Sarah Lenord, Administratrix of the Estate of Frank Rundell, deceased, against your libellant as owner of the steamtug Integrity for damages for loss of life of the deceased as a result of the aforesaid collision with the dredge Raritan and by reason of the same your libellant has been required to pay and has paid to the said plaintiff, Sarah Lenord, the sum of $9,000 for damages arising out of the disaster hereinbefore described and was also obliged to incur considerable legal expense in defense of said suit and libellant has therefore been further damaged.

Sixth. That the aforesaid collision and consequent damage were not caused or contributed to by any fault or neglect on the part of the libellant or those in charge of the steamtug Integrity, but were solely due to and caused by the fault and negligence of the U. S. Hopper Dredge Raritan and those in charge of her navigation, and in addition to any further specific faults which may be developed [fol. 6] at the trial, and which your libellant reserves the right to urge, libellant alleges fault in the following particulars:

1. In that those in charge of the Raritan were incompetent, careless and inattentive to their duties.

2. In that those in charge of the Raritan failed to maintain a sufficient, vigilant and diligent lookout properly stationed and attentive to his duties.

3. In that those in charge of the Raritan failed to take into consideration the force and effect of the wind and tide.

4. In so navigating as to collide with the steamtug Integrity.

5. In that those in charge of the Raritan failed to take proper or seasonable precautions to prevent collision with the Integrity.

6. In that those in charge of the Raritan failed to alter their course to starboard.

7. In that those in charge of the Raritan failed to navigate properly in accordance with the exchange of one blast signals.

8. In that those in charge of the Raritan failed to direct their course sufficiently to starboard.

[fol. 7] 9. In that the Raritan did not keep to that side of the fairway or mid-channel which lay on the starboard side of said Raritan and attempted to pass too near to the Integrity.

10. In that those in charge of the Raritan when they saw, or should have seen that a collision was imminent did not stop and reverse the engines of the Raritan in time to avoid the collision.

11. In that those in charge of the Raritan did not navigate with caution and did nothing to avoid the collision with the Integrity.

Seventh. By reason of the premises the libellant has sustained damages in the sum of Fifty Thousand ($50,000) Dollars, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

Eighth. This action is instituted pursuant to and by virtue of the authority given in Private Law No. 163, enacted by the 68th Congress, Second Session (S. 1038), approved by the President of the United States, February 16th, 1925, for the relief of the Brooklyn Eastern District Terminal:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the Brooklyn Eastern District Terminal, a corporation organized and existing under the laws of the State of New York, with its principal place of [fol. 8] business in the City of New York, in said State, owner of the tugboat Integrity, against the United States for damages alleged to have been caused by collision between the said tugboat and the United States hopper dredge Raritan, in New York Harbor, New York, on or about the 30th day of September, 1920, may be sued for by the said Brooklyn Eastern District Terminal in the United States District Court for the Southern District of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to

enter a judgment or decree for the amount of such damages and costs, if any, as shall be found due against the United States in favor of the Brooklyn Eastern District Terminal, or against the Brooklyn Eastern Terminal in favor of the United States upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal: Provided, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by the order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: Provided further, That said suit shall be brought and commenced within four months of the date of the passage of this Act."

[fol. 9] Ninth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable Court.

Wherefore libellant prays that the court will make an order directing the service of such notice of this suit as the Court may deem proper on the Attorney General of the United States and that upon compliance with the said order the respondent, United States of America, be required to appear and answer this libel within the time limited by the rules of this Court and the aforesaid order and that this honorable Court will hear this cause and determine the same according to the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal and will make a decree in favor of the libellant against the respondent for the damages aforesaid with interest and costs and for such other and further relief as may be just.

Bigham, Englar & Jones, Proctors for Libellant.

Office & P. O. address: 64 Wall Street, New York City.

[fol. 10] *Duly sworn to by Henry O. Havemeyer. Jurat omitted in printing.*

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER OF U. S. A.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of United States of America to the libel of Brooklyn Eastern District Terminal in a cause of collision, civil and maritime, alleges upon information and belief, and respectfully shows as follows:

First. Respondent denies any knowledge or information sufficient to form a belief as to the allegations of Article First of the libel.

Second. Respondent admits the allegations of Article Second of the libel.

Third. Respondent denies the allegations of Article Third of the libel, except as hereinafter specifically admitted or alleged in Article Tenth of this answer.

Fourth. Respondent admits that as a result of the collision between the steamtug Integrity and the dredge Raritan, the carfloat laden with cars and made fast to the Integrity was set adrift. Further answering, respondent denies any knowledge or information sufficient to form a belief as to the other allegations of Article Fourth of the libel.

Fifth. Respondent denies any knowledge or information sufficient to form a belief as to the allegations of Article Fifth of the libel.

[fol. 12] Sixth. Respondent denies each and every allegation of Article Sixth of the libel.

Seventh. Respondent denies any knowledge or information sufficient to form a belief as to the allegations of Article Seventh of the libel, except that it admits that no part of the sum of $50,000 has been paid by respondent to libellant, although duly demanded.

Eighth. Respondent admits the allegations of Article Eighth of the libel.

Ninth. Respondent admits the admiralty and maritime jurisdiction of the United States and of this honorable court and denies the other allegation of Article Ninth of the libel.

Tenth. Further answering, respondent alleges that shortly after 1 p. m., September 30th, 1920, the Raritan was proceeding loaded, down New York Bay, bound to sea. The weather was hazy, with strong southeast, wind, tide ebb. When about a mile to the southward of Bedloe's Island and on the westward side of the channel, a steamtug, which proved to be the Integrity, was observed, with a loaded carfloat on her starboard side, about head on to the Raritan proceeding in the opposite direction. The Integrity sounded a one blast signal, signifying a port to port passing, which the Raritan immediately answered with one and altered her course to starboard. When approximately 1,000 feet away, the Integrity sounded two blasts of her [fol. 13] whistle and was seen to be sagging over to her own port across the course of the Raritan. The Raritan thereupon reversed her engines full speed, but before her headway could be checked the port side of the Integrity collided with the port bow of the Raritan, parting the towing lines of the Integrity, permitting the carfloat to go adrift and causing considerable damage to both colliding vessels. As a result of the collision, the stem of the Raritan was badly bent, her port hawse pipe broken, and a number of plates on her port bow badly dented. After the collision, the Raritan stood by and rendered all possible assistance to the Integrity and her crew before proceeding on her voyage.

Eleventh. The collision and consequent damage were not due to any negligence on the part of the respondent, its agents, servants or employees, but were due solely to the fault and negligence of the Integrity and those in charge of her in the following respects, among others:

(1) She was not in charge of a competent person.

(2) She failed to keep a proper lookout.

(3) She failed to make a proper allowance for the effect of the wind and tide.

(4) She failed to alter her course to starboard in accordance with the passing agreement instituted by her.

[fol. 14] (5) She failed to keep to that side of the fairway or mid-channel which lay on her starboard side.

(6) She had insufficient power to manage her tow under the existing weather conditions.

(7) She instituted a passing agreement with the Raritan, which she was unable to carry out.

(8) After obtaining an agreement with the Raritan and causing that vessel to navigate in accordance therewith, she sounded signals and attempted to navigate contrary to the same.

(9) She failed to stop and reverse her engines when danger of collision was, or should have been, apparent.

(10) She did nothing to avoid the collision.

Twelfth. All and singular the premises are true.

Wherefore respondent prays that the libel herein be dismissed with costs.

Emory R. Buckner, United States Attorney for the Southern District of New York, Proctor for Respondent.

Office & Post Office Building, room #700, 45 Broadway, Borough of Manhattan, City of New York.

[fol. 15] *Duly sworn to by Charles E. Wythe. Jurat omitted in printing.*

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[fol. 16] In United States District Court

Cross-Libel

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The cross-libel of the United States of America, as owner of the dredge Raritan, against Brooklyn Eastern District Terminal, as owner of steamtug Integrity in a cause of collision, civil and maritime, alleges upon information and belief and respectfully shows as follows:

First. At all the times hereinafter mentioned the United States of America, the cross-libellant herein, was and now is a corporation sovereign and owner of the dredge Raritan, which at the time of the collision hereinafter mentioned was operated by it as a public vessel and at said times was in all respects tight, staunch and strong, seaworthy and properly manned, equipped and supplied.

Second. At all of said times, the Brooklyn Eastern District Terminal, the cross-respondent herein, was an now is a domestic corporation, organized and existing under and by virtue of the laws of the State of New York, having its office and principal place of business within this District, and was the owner of the steamtug Integrity.

Third. Shortly after 1 p. m., September 30th, 1920, the Raritan was proceeding, loaded, down New York Bay, bound to sea. The weather was hazy, with strong southeast wind, tide ebb. When about a mile to the southward of Bedloe's Island and on the westward side of the chan- [fol. 17] nel, a steam-tug which proved to be the Integrity, was observed, with a loaded carfloat on her starboard side, about head on too the Raritan proceeding in the opposite direction. The Integrity sounded a one blast signal, signifying a port to port passing, which the Raritan immediately answered with one and altered her course to starboard. When approximately 1,000 feet away, the Integrity sounded two blasts of her whistle and was seen to be sagging over to her own port across the course of the Raritan. The Raritan thereupon reseversed her engines full speed, but before her headway could be checked the port side of the Integrity collided with the port bow of the Raritan, parting the towing lines of the Integrity, permitting the carfloat to go adrift and causing considerable damage to both colliding vessels. As a result of the collision, the stem of the Raritan was badly bent, her port hawse pipe broken, and a number of plates on her port bow badly dented. After the collision, the Raritan stood by and rendered all possible assistance to the Integrity and her crew before proceeding on her voyage.

Fourth. The collision and consequent damage were not due to any negligence on the part of the respondent, its agents, servants or employees, but were due solely to the fault and negligence of the Integrity and those in charge of her in the following respects, among others:

(1) She was not in charge of a competent person.

(2) She failed to keep a proper lookout.

[fol. 18] (3) She failed to make a proper allowance for the effect of the wind and tide.

(4) She failed to alter her course to starboard in accordance with the passing agreement instituted by her.

(5) She failed to keep to that side of the fairway or mid-channel which lay on her starboard side.

(6) She had insufficient power to manage her tow under the existing weather conditions.

(7) She instituted a passing agreement with the Raritan, which she was unable to carry out.

(8) After obtaining an agreement with the Raritan and causing that vessel to navigate in accordance therewith, she sounded signals and attempted to navigate contrary to the same.

(9) She failed to stop and reverse her engines when danger of collision was, or should have been, apparent.

10. She did nothing to avoid the collision.

Fifth. By reason of the matters aforesaid, the cross-libellant has sustained damage consisting of repairs to the Raritan, detention and miscellaneous expenses, amounting [fol. 19] to approximately $5,000, no part of which has been paid, although duly demanded.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable Court.

Wherefore libellant prays that process in due form of law may issue, citing the respondent, Brooklyn Eastern District Terminal, to appear and answer on oath all and singular the matters aforesaid; that the libellant may have a decree against the respondent for its damages aforesaid, and for such other and further relief as may be just.

Emory R. Buckner, United States Attorney for the Southern District of New York, Proctor for Cross-Libellant.

Office & Post Office, Room #700, 45 Broadway, Borough of Manhattan, City of New York.

[fol. 20] *Duly sworn to by Charles E. Wythe. Jurat omitted in printing.*

[fol. 21] IN UNITED STATES DISTRICT COURT

ANSWER TO CROSS-LIBEL

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Answer of Brooklyn Eastern District Terminal to the cross-libel of United States of America, in a cause of collision, civil and maritime, alleges upon information and belief and respectfully shows to this honorable Court as follows:

First. Respondent admits that cross-libellant was and is a corporation sovereign and owner of the dredge Raritan, which it operated as a public vessel, but denies each and every other allegation contained in Article "First" of the cross-libel.

Second. Respondent admits the allegations contained in Article "Second" of the cross-libel.

Third. Respondent denies the allegations contained in Article "Third" of the cross-libel except as specifically admitted or modified in Article "Seventh" of this answer.

Fourth. Respondent denies each and every allegation contained in Article "Fourth" of the cross-libel.

Fifth. Respondent denies that it has any knowledge or information sufficient to form a belief as to the alleged damages to the Raritan, and further answering denies any demand for payment as alleged in Article "Fifth" of the cross-libel.

[fol. 22] Sixth. Respondent admits the admiralty and maritime jurisdiction of the United States and of this honorable Court and denies each and every other allegation contained in Article "Sixth" of the cross-libel.

Seventh. Further answering, respondent alleges that the true facts and circumstances attending the occurrence set forth in the cross-libel are as follows:

On the 30th day of September, 1920, about 1 p. m., the steamtug Integrity left St. George, Staten Island, New York, with carfloat New York Central No. 61 in tow, made fast on the starboard side of the tug, proceeding up the bay

on a course a little to the east of the center of the channel. The weather was clear but there was a strong southeast wind which caused the tug and tow to make leeway. There was a considerable sea for this part of the harbor. While proceeding on this course those in charge of the tub observed the hopper dredge Raritan about ahead, headed down the bay in the opposite direction. Signals of one blast were exchanged. The helm of the tug was ported and her heading changed to starboard, but the Raritan continued to head directly for the Integrity. The Integrity again blew one blast, which was again answered by one blast from the Raritan. The Integrity got as far to starboard as it was possible for her to do, but no change in course was made on the part of the Raritan. When the Raritan had gotten within such a short distance of the tug and tow that a colli-
[fol. 23] sion was inevitable, the Raritan blew an alarm signal. The Integrity answered with an alarm signal and the engines of the tug were stopped. The Raritan struck the Integrity on her port bow and the Integrity was badly damaged and her towing lines were parted. By the force of the collision one of the crew of the tug, a fireman named Frank Rundell, was thrown into the water and drowned.

Eighth. That the aforesaid collision and consequent damage, if any, were not caused or contributed to by any fault or neglect on the part of the respondent or those in charge of the steamtug Integrity, but were solely due to and caused by the fault and negligence of the U. S. hopper dredge Raritan and those in charge of her navigation, and in addition to any further specific faults which may be developed at the trial, and which your respondent reserves the right to urge, respondent alleges fault in the following particulars:

1. In that those in charge of the Raritan were incompetent, careless and inattentive to their duties.

2. In that those in charge of the Raritan failed to maintain a sufficient, vigilant and diligent lookout properly stationed and attentive to his duties.

3. In that those in charge of the Raritan failed to take into consideration the force and effect of the wind and tide.

[fol. 24] 4. In so navigating as to collide with the steamtug Integrity.

5. In that those in charge of the Raritan failed to take proper or seasonable precautions to prevent collision with the Integrity.

6. In that those in charge of the Raritan failed to alter their course to starboard.

7. In that those in charge of the Raritan failed to navigate properly in accordance with the exchange of one blast signals.

8. In that those in charge of the Raritan failed to direct their course sufficiently to starboard.

9. In that the Raritan did not keep to that side of the fairway or mid-channel which lay on the starboard side of said Raritan and attempted to pass too near to the Integrity.

10. In that those in charge of the Raritan when they saw, or should have seen that a collision was imminent did not stop and reverse the engines of the Raritan in time to avoid the collision.

11. In that those in charge of the Raritan did not navigate with caution and did nothing to avoid the collision with the Integrity.

Ninth. All and singular the premises of this answer are true.

[fols. 25-97] Wherefore respondent prays that the cross-libel herein be dismissed with costs and for such other and further relief as to this honorable Court may seem just and proper.

Bigham, Englar & Jones, Proctors for Cross-Respondents.

Office & P. O. address: No. 64 Wall Street, Borough of Manhattan, City of New York.

*Duly sworn to by J. H. McCafferty. Jurat omitted in printing.*

[fol. 98] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BROOKLYN EASTERN DISTRICT TERMINAL COMPANY, as Owner of the Steamtug Integrity, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the U. S. Hopper Dredge Raritan, Respondent

Messrs. Bigham, Englar & Jones, by Leonard J. Matteson, Esq., for Libellant and Cross-Respondent.
Hon. Charles H. Tuttle, by Charles E. Wythe, Esq., for Respondent and Cross-Libellant.

OPINION

BONDY, District Judge:

These are cross suits arising out of a collision which occurred in the Upper Bay, New York, opposite Greenville Channel, September 30, 1920, between the Steamtug Integrity, towing a loaded carfloat on her starboard side, and the steam dredge Raritan. The wind was blowing a gale of forty to over fifty miles per hour from the southeast. The tide was ebb. The tug was proceeding up the bay, and the dredge in an opposite direction towards the dumping ground at sea.

[fol. 99] Though the evidence is conflicting, whether the collision occurred on the easterly or westerly side of the main channel, libellant and respondent agree that the Integrity and Raritan approached each other end on and properly exchanged blasts of one whistle and that situation was governed by Art. 18, Rule 1 of the Inland Rules. It provides: "When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vesel shall give as a signal of her intention one short and distinct blast of her whistle which the other vessel shall answer promptly by a similar blast of one whistle and thereupon such vessels shall pass on the port side of each other."

The captain of the Integrity testified that after the exchange of signals and when the vessels were over half a

mile apart, he put her helm hard to port at times to hold her over as far as he could to the wind, and that when the sea would start washing over her, he straightened her up, and that he was just about able to make a good course up the channel without getting further to the eastward.

The captain admitted the Integrity was making leeway to the westward and though she may have been sagging westward, his port helm held her on her original course, and that he could have gone probably four or five hundred feet further to the eastward, and that the wind was not strong enough to prevent him from going to the eastward and making Buttermilk Channel as he intended to do. It is also apparent that if the collision took place on the easterly side of the channel as libellant contends, then the Integrity was navigated eastwardly through the gale.

[fol. 100] The Raritan was being navigated by her third mate, who had never held a position higher than deckhand before becoming third mate in the Raritan two months before the accident.

The quartermaster of the Raritan testified that he steered the Raritan by landmarks; that after the exchange of the one-blast signals, when the Integrity and Raritan were over a half mile apart, he altered his course about one point to starboard for a short time and then brought the Raritan back on her original course and steered for the same landmark again. The third mate testified that he could not say that the Raritan moved over to starboard more than fifty feet and that he did not take into consideration whether or not the Integrity was making leeway.

"Steamships meeting end on, or nearly end on, should seasonably adopt the required precaution and neither can be excused from responsibility in case of omission merely upon the ground that it was the duty of the other to have adopted the corresponding precaution at the same time, if it appears that the party setting up that excuse enjoyed equal facility to obey the requirement with the other party, and might have prevented the disaster. Imperative obligation is imposed upon each to comply with the rule of navigation; nor will the neglect of one excuse the other in a case where each might have prevented the disaster as the law requires both to adopt every necessary precaution, if practicable, to prevent the collision, and will not tolerate any at-

tempt of either in such an emergency to apportion the required precaution to avoid the impending danger in case [fol. 101] where both or either might secure perfect safety to both ships and all intrusted with their control and management."

The America, 92 U. S. 432, 433.

When the vessels were about eight hundred feet apart and two blasts of an intended alarm had been given by the Integrity, the whistle cord broke. The third mate on the Raritan thought the Integrity had given a cross-signal so he immediately reversed his engines and put his helm hard-a-port. The two-blast signal, therefore, had the same effect as the intended alarm signal would have had, and, therefore, could not have been a contributing cause of the collision.

The Raritan attempted to sound alarms when two blasts of the intended alarms were heard, but the whistle cord stuck after one blast was sounded. This final one-blast of the Raritan could not have misled the tug. It was a repetition of the former signal and as much a refusal of the tug's two-blast signal as an alarm could have been.

Whether the Raritan turned to starboard immediately before the collision, or had the captain of the Integrity not deserted the Integrity and not stopped the engine and allowed her to drift, the collision could have been avoided seems unimportant because both vessels were at fault in not observing the rule.

If either vessel had properly complied with the rule and had ported sufficiently to clear the course of the other, the collision would have been avoided.

"Even flagrant fault committed by one of two vessels approaching each other from opposite directions will not excuse the other from adopting every proper precaution to [fol. 102] prevent collision."

The America, 92 U. S. 432, 436;
The Mary C. Elphicke, 115 Fed. 375.

Both vessels having been at fault, the damages should be equally apportioned.

January 24, 1929.

Wm. Bondy, U. S. District Judge.

[fol. 103] In United States District Court

Present: Hon. William Bondy, U. S. D. J.

A. #90-165

Brooklyn Eastern District Terminal, Libellant,

against

United States of America, Respondent

A. #90-329

United States of America, Cross-Libellant,

against

Brooklyn Eastern District Terminal, Cross-Respondent

Interlocutory Decree—Feb. 4, 1929

The above entitled causes having duly come on to be heard on the pleadings and proofs of the respective parties, and due deliberation having been had, and the Court having filed its opinion in writing holding that both vessels are at fault for the collision,

[fol. 104] Now, on motion of Bigham, Englar, Jones & Houston, proctors for the libellant, Brooklyn Eastern District Terminal, it is

Ordered, Adjudged and Decreed that the Brooklyn Eastern District Terminal, as owner of the steamtug Integrity do have and recover of and from the United States of America, owner of the hopper dredge Raritan one-half of the difference between its damages and the damages of the United States of America, as owner of the hopper dredge Raritan sustained as a result of this collision, or vice versa, in the event that the damages of the United States of America shall prove to be greater than those of the Brooklyn Eastern District Terminal, and it is further

Ordered that it be referred to George V. A. McClosky, Esq., as Special Commissioner, to take proofs and report the amounts of the damages of the respective parties to this Court with all convenient speed.

Wm. Bondy, U. S. D. J.

[fol. 105] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. #90-165

BROOKLYN EASTERN DISTRICT TERMINAL, Libellant,

against

UNITED STATES OF AMERICA, Respondent

A. #90-329

UNITED STATES OF AMERICA, Cross-Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Cross-Respondent

**Statement of Evidence Before Special Commissioner, Taken on Behalf of Brooklyn Eastern District Terminal**

New York, September 27th, 1929.

Hearing held at the office of George V. A. McCloskey, Special Commissioner, 120 Broadway, Borough of Manhattan, New York City.

[fol. 106] APPEARANCES

Messrs. Bigham, Englar & Jones, Proctors for Libellant, Brooklyn Eastern District Terminal, by Leonard J. Matteson, Esq., Willard M. L. Robinson, Esq.

Charles H. Tuttle, United States Attorney, by Charles E. Wythe, Esq., Special Asst. U. S. Attorney.

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THOMAS KILPATRICK, being duly sworn as a witness for the libellant, testified as follows:

Direct examination.

By Mr. Matteson:

Q. You are connected with the Brooklyn Eastern District Terminal, are you not?

A. Yes.

Q. What is your position?

A. Superintendent of Equipment and Structures.

Q. How long have you held that position, Mr. Kilpatrick?

A. Eighteen years.

Q. Have you had other experience in connection with the construction and maintenance of vessels and tugboats, etc.?

A. No.

Q. Your experience has been entirely in connection with the Brooklyn Eastern District Terminal?

A. Yes, so far as marine equipment is concerned.

Q. And during your years of experience with that company have you had charge of their work in connection with repair and upkeep of tugboats?

A. Yes.

[fol. 107] Q. Does that include supervising repairs and estimating costs and examining and passing on repair bills, and so forth?

A. Yes.

Q. Do you recall what was the first time you saw the Integrity after this collision?

A. About three or four o'clock in the afternoon on the date of the collision.

Q. Where was she at that time?

A. At the dock at the foot of North 9th St., Brooklyn.

Q. What was her condition at that time?

A. She was stove in on the port side, forward of the engine room bulkhead.

Q. How seriously?

A. The plates were all removed from the deck to the keel and renewed.

Q. That is, they were all damaged?

A. Yes.

Q. Was she in any condition to handle a carfloat at that time?

A. Not in my opinion.

Q. You have heard the question that has been raised here as to whether the tugboat Integrity after the collision should not have handled her carfloat herself rather than turning her carfloat over to someone else—can you tell us whether or not in your judgment it would have been prudent for the Integrity to handle her carfloat herself?

Mr. Wythe: The question is objected to on the ground that the witness is not properly qualified to testify.

Commissioner: Overruled. I think the witness, though not a navigator, is nevertheless qualified to pass upon the condition of the tug for use by a navigator.

A. In my judgment it would not have been prudent.

[fol. 108] Q. What was done with respect to repairing the damages?

A. Arrangements were made with the Vulcan Iron Works, of Jersey City, to drydock the vessel. All interested parties were notified and a survey was held and the extent of the damage agreed upon. Estimates were obtained, work authorized and all repairs contained in the survey were made.

Commissioner: Who was the lowest bidder?

A. The Vulcan Iron Works.

By Mr. Matteson:

Q. Is this a copy of the survey?

A. Yes.

Q. Is that your name signed at the bottom of it?

A. Yes, it is my name.

Q. I see also a name signed to this survey—J. H. Jackson, who was he?

A. He represented the Government.

Q. And the other three surveyors—Bagger, Steendal and Forsberg—did they represent various interested underwriters?

A. Yes, sir.

Mr. Matteson: I offer the survey in evidence.

Commissioner: Any objection?

Mr. Wythe: No Objection.

Commissioner: Admitted as Libellant's Exhibit 1.

[fol. 109] By Mr. Matteson:

Q. Was there a conference among the surveyors at that time to determine whether or not the work should be put out to bids?

A. Yes.

Q. And as the result of that conference what was decided?

A. It was decided to ask for tenders from a certain number of shipyards agreed upon among the surveyors.

Q. Did Mr. Jackson concur in that arrangement?

A. He did.

Q. Have you with you the original bids that were received from various shipyards?

A. Yes, I have all of them.

Mr. Matteson: I am perfectly willing to offer them in evidence or read them into the record.

(Mr. Matteson produces the original bids and exhibits them to the advocate for the United States).

The names of the bidders and the amounts of the bids were read into the record as follows:

Oct. 6, 1920, James Shewan & Sons, $26,694—30 days.

Oct. 5, 1920, Vulcan Iron Works, $25,850—30 days.

Oct. 6, 1920, Tietjen & Lang Drydock Co., $26,300—31 days.

Oct. 5, 1920, Staten Island Shipbuilding Co., $27,000—32 days.

Oct. 6, 1920, Theodore A. Crane's Sons Co., $27,000—one month.

Oct. 4, 1920, Tiebo Yacht Basin Co. replied:

[fol. 110] "We regret to state, however, that we will not be able to give you an advantageous figure for this work at present, inasmuch as our drydocking list will not permit us to tie up the dock at this time."

By Mr. Matteson:

Q. I have read the complete list, have I, Mr. Kilpatrick?

A. Yes.

Q. Where were these bids opened, do you recall, Mr. Kilpatrick?

A. I think they were opened at my office—either my office or at Bagger's—all the bidders were present when the bids were opened, whether it was at my office or Bagger's.

Q. And after the bids were opened was there another conference of the surveyors as to the acceptance of these bids?

A. Not at which I was present.

Q. Was there some discussion of the question of whether or not one of these bids should be accepted?

A. Not in my presence.

Q. Was any one of these bids accepted?

A. No.

Q. Why not, can you tell me?

Mr. Wythe: I object to that question—the witness has just said he was not present at the discussion.

Mr. Matteson: He is the moving factor in this matter.

Commissioner: The witness' statement was with reference to a discussion among the surveyors if such there was. The present question relates to the reason for rejecting the bids.

[fol. 111] Mr. Wythe: May I say that my objection is only in case the bids were rejected by the surveyors? If he means rejected by him, I withdraw the objection.

Commissioner: Who rejected the bids?

A. The underwriters.

Commissioner: Of the Brooklyn Eastern District Terminal?

A. Yes.

By Mr. Matteson:

Q. Who was making the arrangements? Were they made by you on the instructions of the underwriters, or were they made by the underwriters direct?

A. In reference to the repairs or the rejection of the bids?

Q. Either.

A. The underwriters instructed the owners of the vessel to reject the bids.

Q. By the owners of the vessel you mean your company, the Brooklyn Eastern District Terminal?

A. Yes.

Q. And you know the reason for that?

A. Yes.

Q. What was it?

A. On the advice of their own surveyor or surveyors, they came to the conclusion that the bids were all too high,

and that the work could be done for less, on a day's work basis.

Q. What arrangement was then made for doing the repairs?

A. I was then instructed to authorize the Vulcan Iron Works to proceed with the repairs in accordance with the survey on a day's work basis, material and labor, and labor and material bills would be checked by an accounting firm known as Alley, Eells & Co.

Q. And did you make that arrangement with the Vulcan Iron Works?

A. I did.

[fol. 112] Q. And did the Vulcan Iron Works proceed to make the repairs according to the survey, on that basis?

A. They did.

Q. Did you personally do anything in the nature of keeping track of the work as it progressed?

A. Yes.

Q. Tell us what you did.

A. I placed a marine engineer on the vessel to supervise and inspect all of the work that was performed and to call my attention to any objections that he thought fit. I personally inspected the work from two to three times a week during all of the time the vessel was undergoing repairs.

Q. What was the object of this supervision by your marine engineer and yourself?

A. To see that the work was done in accordance with the specifications.

Q. Did you also do what could be done to expedite the work?

A. Yes, in conjunction with Alley, Eells & Co.'s inspectors and accounts—they had both—we were cooperating together, or tried to.

Q. Were Alley, Eells & Co. a firm that specialized in such work as this, supervising repairs on time and material basis?

A. Yes.

Q. Can you tell us when the repairs on the Integrity began and when they were completed—you can refresh your recollection from the bill if you want to.

A. On October 1st, that was the date the vessel was docked, and on December 15th the repairs were completed.

Q. And the Integrity was at the plant of the Vulcan Iron Works during that period?

A. Yes, during all of that time.

[fol. 113] Q. What is this document that I show you here —is that a repair bill?

A. Yes, this is a repair bill.

Q. It was approved by Alley, Eells & Co., wasn't it?

A. Yes.

Q. And what is the total amount of the repair bill?

A. The total amount of this bill is $23,526.32. There is an additional bill here of $88.25 which does not appear to be included in that amount.

Q. What was the additional bill for—can you tell us?

A. Omissions and errors.

Q. Does that cover repairs included in the original survey?

A. There was a second survey?

Q. Have you a copy of that second survey?

A. Yes.

Q. Was the Government represented on this survey?

A. No.

Q. Was the Government notified to attend at this survey?

A. Yes.

Q. But they failed to put in an appearance?

A. They did.

Mr. Matteson: Any objection to that being marked?

Mr. Wythe: Not to its being marked.

Commissioner: Second survey admitted in evidence without objection and marked Libellant's Exhibit 2.

By Mr. Matteson:

Q. This repair bill including the extra item that you referred to—was that for repairs in accordance with the two surveys that have been marked in evidence?

A. Yes.

[fol. 114] Q. And did you check this bill yourself?

A. No, sir.

Q. Was it checked under your supervision?

A. In my office, yes.

Q. Was it approved by you?

A. Yes, as to extension and amounts only.

Q. And was it paid?
A. It was.
Q. Can you tell us what date it was paid?
A. No.
Q. How can you find that out?
A. I have to find that out through our secretary or auditor.

Mr. Matteson: I offer this bill in evidence.
Mr. Wythe: No objection.
Commissioner: Bill admitted as Libellant's Exhibit 3.

By Mr. Matteson:

Q. Throughout the arrangements for these repairs and during their progress and completion did you exercise your best efforts to have the repairs done as expeditiously and as cheaply as possible?
A. I did.

Commissioner: Did the underwriters for the Brooklyn Eastern District Terminal have any other representative on the spot than yourself and your assistants?
A. They did.
Q. Who were they?
A. Alley, Eells & Company's representative.
Q. Did you consider the amount of this bill reasonable?
A. I did.

[fol. 115] By Mr. Matteson:

Q. How much time was lost by the tugboat Integrity in your service as the result of this accident?
A. 76 or 78 days, I think.
Q. Suppose we do it by dates. The accident occurred on Sept. 30th, did it not?
A. Yes.
Q. And the tugboat was at drydock from Oct. 1st to Dec. 15th, and was the boat ready to go back into service immediately after the repairs were completed?
A. No.
Q. And how many additional days did you lose before she was ready for service?
A. Two days.

Q. Why was that?

A. Outfitting, getting up steam, cold water, and so forth.

Q. So your claim is loss of use from the period October 1st to December 17th, inclusive, is that correct?

A. Yes.

Q. What was the value of the use of the tugboat Integrity through that period?

A. $15 an hour.

Q. How many hours per day?

A. 10 to 12.

Q. Is that the number of hours that your tugboats are usually in service?

A. Yes.

Commissioner: Single crew?

A. Yes.

By Mr. Matteson:

Q. And your claim is for $150 a day?

A. Correct.

Commissioner: Was the Integrity used solely in your own business?

[fol. 116] A. Yes, sir.

Q. But there always was such business?

A. Yes.

Q. The general nature of the Brooklyn Eastern District Terminal's business is that it operates in conjunction with various railroads and acts as a transfer medium for freight, is that correct?

A. That is right.

By Mr. Matteson:

Q. In that connection, your tugs are engaged in the towing of carfloats and other railroad equipment between points in New York Harbor?

A. Only carfloats.

Q. You are making no claim in this proceeding, I understand, Mr. Kilpatrick, for your services or those of the marine engineer that you assigned to inspect the repairs?

A. No, sir, none.

Q. You did not have anything to do with the payment of Alley, Eells & Company's bill, did you?

A. Nothing whatever. The bills were passed through my hands but I had nothing to do with the amounts or the arrangements made with them.

Commissioner: Did the wound in the side of the Integrity extend below the water line in such a way as to let water into the hull?

A. Very little.

Q. Not more than the pumps could keep down?

A. Not more than that.

Q. What is the basis of the charge of $15 an hour for the services of the Integrity? Is that derived from the rates [fol. 117] you charge for towage or is it derived from analysis of your costs, or what?

A. It is derived from the rates that we are obliged to pay when we hire a boat.

Q. That is to say, you pay $15 an hour for a substitute to do the same work?

A. Yes.

Q. In this instance, were you compelled to employ substitute tugs?

A. I could not answer that question without checking the records, but I will state that if we did, it was very little.

Q. That is to say, you managed for the most part to get along with your other tugs?

A. Yes, sir.

Q. Did you have to work the other tugs a greater number of hours?

A. We did.

By Mr. Matteson:

Q. And employ additional crews?

A. No, sir.

Cross-examination.

By Mr. Wythe:

Q. How many tugs did you have at that time?

A. Three.

Q. Including the Integrity?

A. Yes.

Q. Were these three tugs kept constantly busy on your own business at that time?

A. They were.

Q. What kind of work were they doing?

A. Towing carfloats.

Q. Where were these carfloats towed to and from as a general rule?

A. All of the railroads in New York Harbor except the Long Island Railroad.

Q. And approximately how many carfloats a day were towed each day on an average by these tugs?

A. I could not answer that question.

Q. Have you any idea at all?

A. They would probably handle from five to six carfloats [fol. 118] each per day, that is, I am talking about towing, not the other work we have to do.

Q. What other work did you do?

A. Shifting loads from bridge to bridge—shifting floats to and from the American Sugar Refining Company and to and from the National Sugar Refining Company, and at the railroad bridges. I would like to say something: I am not trying to testify as an operating man. I do not handle the boats in their operation; I do not give them instructions where to go or where not to go, it is my business to get them in shape to go and to be able to do the work when called upon.

Q. Do you know of your own knowledge what you have testified to about other tugs working additional time while the Integrity was laid up?

A. I do.

Q. Was that under your direct supervision?

A. It was.

Q. I thought you have just testified that you were not the operating man?

A. No, but I have to furnish the equipment.

Q. So you know of your own knowledge that the other two tugs were working extra time while the Integrity was laid up?

A. I do.

Q. Do you know how much extra time tthey worked?

A. One-half more than they did before.

Q. That is just an estimate on your part, is it not?

A. Two boats were doing the work of three.

Q. That does not necessarily mean that it would take two boats one-half time again to do the work of three?

A. I am speaking of working hours.

Q. You mean that there were that many more additional hours?

A. To each boat, yes.

[fol. 119] Q. So that you used your own boats extra hours instead of hiring additional tugboats to take the Integrity's place?

A. Yes.

Q. Was that more economical than hiring outside tugs?

A. Yes.

Q. How much more, do you think?

A. That would be a very difficult question to answer, to answer it correctly, for the reason that as we intensified the activity of the other two boats, our maintenance was going behind.

Commissioner: In other words, you wear up your equipment more quickly by using it more fully?

A. Correct. But I think, had we paid $150 a day for a tugboat, it would probably have cost us much more in the long run.

By Mr. Wythe:

Q. Can you give us any estimate of how much it would cost you?

A. No. I could not do that, it would be impossible.

Q. Could you give us any approximation of it?

A. No, I could not and be happy in the correctness of it.

Q. That is what we are concerned with here, what you saved by using your own tugs additional time.

A. Wear and tear on deferred maintenance is something that no one can compute, what the cost would be.

Q. I did not ask you to compute it, I just want you to give us your best estimate as to what you probably saved [fol. 120] during that period?

A. I do not see how I could answer that question.

Q. You are not willing to make any estimate of it?

A. Why, it is impossible to do so.

Commissioner: After the Integrity returned to service, did you have to lay off either of the other boats for the purpose of making special repairs required by hard usage?

A. We probably did, but that is something that I would

have to check up on. This is ten years ago, and I have not been looking into this thing. I could not tell you just what happened with respect to repairs after this boat was returned to service.

By Mr. Wythe:

Q. As to the time that the Integrity was undergoing repairs, you say she was out of service from the day of the collision, September 30th, until December 17th, is that correct?

A. That is my recollection.

Q. I have heard she finished repairs December 15th and two days after that she went into service.

A. That is correct.

Q. Do you know why those repairs took so long?

A. It required that much time to do the work.

Q. The bids have been read into the record. The Vulcan Iron Works, the same people who did the repair work, estimated thirty days on the job, and did you know why it took so much longer?

A. They underestimated, all of them.

[fol. 121] Q. Have you had any experience in making estimates on cost of repairs—what experience have you had?

A. I estimate on all of the repairs that were made to our floating equipment, whether for our own maintenance or in cases of damage.

Q. How long is your experience in making estimates?

A. You have reference to marine matters only, I presume?

Q. Yes.

A. Eighteen years.

Q. And now at the time that this survey was made up, Libel-ant's Exhibit I which you signed, did you in conjunction with the other surveyors make any estimate of what that job was worth—what it would cost?

A. No, I did not.

Q. Do you know whether the other surveyors made any estimate?

A. I do.

Q. Do you know what their estimate was?

A. No, I do not.

Q. Did you yourself make any estimate as to the length of time your tug was going to be laid up for making those repairs at the time of that survey?

A. I did not.

Q. At the time these bids were open, did you consider that the number of days that the various bidders specified was an underestimate?

A. I did.

Q. All of them?

A. Yes, all of them.

Q. Upon what did you base your conclusion?

A. On the quantity of work to be performed.

Q. Although you had not made any estimate of your own as to how long it would take?

A. That is correct.

Q. You just thought they were all estimating too short a time?

A. I did.

[fol. 122] Q. Have you ever had jobs done before on a cost plus basis with inspectors and accountants supervising the work?

A. Not before that, with inspectors and accountants supervising the work.

Commissioner: You have had it with persons appointed to inspect?

A. Yes.

By Mr. Wythe:

Q. In your experience, does the cost-plus job take longer than a straight contract job?

A. Yes.

Q. Do you know why?

A. There is less incentive on the part of the contractor to get the last out of his men.

Q. You say you never had any experience with Alley, Eells & Company before on these jobs?

A. I did not.

Q. Do you know what kind of work they did in connection with these repairs?

A. Yes.

Q. What kind of work did they do?

A. They checked the time and material and asked for more men when they felt it was necessary that more men should go on the job, asked men to be taken away when they thought there were too many.

Q. Is that something you have been told that they did?

A. Something they told me that they were doing, and the shipyard told me the same thing.

Q. Of your own knowledge, you did not see any of that being done, did you?

A. No.

Q. You do not know the methods that they used in checking the material, for instance?

A. No.

[fol. 123] Q. Do you know whether Alley, Eells & Company made any report of their activities in connection with these repairs?

A. I do not.

Q. I believe you have testified on direct examination that the bill of the Vulcan Iron Works, Libelant's Exhibit I, was approved by Alley, Eells & Company?

A. Yes.

Q. I show you the last page on the bill with the total and call your attention to the stamp on there. What does that stamp say?

A. Checked and passed, Alley, Eells & Co., by Ralph J. Frank, Feb. 14, 1921.

Q. That is what you refer to when you say it was approved by them?

A. Yes. Apparently Mr. Bagger saw those bills too.

Q. I see his signature on the last page of each bill, and he has marked them "Signed and Noted". Do you consider that is an approval of the bill?

A. I do.

Q. Do you know how much Alley, Eells & Company charged for their services?

A. I do not remember now.

Q. Did any of the surveyors tell you at any time that they thought the repairs in that survey could be performed for $17,500?

Mr. Matteson: I object to that question.

Commissioner: The witness says, I do not wish to speak out of turn, but I do wish to be as helpful as I can.

Witness: The estimate for $17,500 made by the surveyors was made prior to the time that bids were asked for from anyone except the Vulcan Iron Works. The Vulcan Iron [fol. 124] Works bid at that time without competition—it was a little over $23,000. I do not remember just how much —and that was thrown out as being excessive, and then it was sent out to the shipyards to find out just how cheaply it could be done.

Mr. Matteson: As long as we are getting this sort of material on the record, is there any objection to stating on the record that the estimate made at that time by Mr. J. H. Jackson, representing the Government, was $26,500?

Mr. Wythe: I have no information of any such estimate. If you have any proof of it, I have no objection to its being in the record.

Mr. Matteson: Mr. Bagger tells me that that was the estimate made by Mr. Jackson at that time.

Witness: Mr. Jackson said the same thing to me.

Mr. Wythe: I think that Mr. Matteson's statement should be stricken from the record, but the witness' statement that Mr. Jackson said so is pertinent.

Commissioner: I think that any vice in Mr. Matteson's statement is cured by the witness.

By Mr. Wythe:

Q. You say that you yourself saw the Integrity after the collision?

A. I did.

Q. The same afternoon?

A. Yes, the same afternoon.

[fol. 125] Q. She was afloat at that time?

A. She was.

Q. And she was not making water to any extent?

A. No.

Q. And she had come from the place of collision under her own power?

A. She did.

Q. The two days which elapsed after the completion of repairs were merely for getting the tug into condition to work again?

A. Yes.

Q. You stated, as I have it, that that was outfitting, getting coal and water, etc.?

A. Correct.

Q. Can you elaborate on that a little bit? What do you mean by outfitting?

A. The outfitting of a tugboat in our service that has been laid up is as follows:—the large rope bow fenders have to be installed; hanging wood fenders on the sides, placing of coal and water on board the boat, oil, waste, supplies,—when I say supplies I refer to rope and articles of that character, lamps, riding lights, side lights, stern lights, various things that are necessary to have a boat equipped in accordance with the law to navigate in New York Harbor.

Q. Were all of these things stripped from the Integrity when she went to drydock?

A. Yes.

Q. Was it necessary, in your opinion, to take all of these articles from the Integrity at the time she went into drydock?

A. Yes, it was necessary. All of the fenders on the port side and the bow fenders had to be removed to permit of the repairs being made. The rest of the equipment was taken off to preserve it, to see that it did not get away. That is our practice.

Q. Is that the usual time it takes to outfit a tug when she comes off drydock?

A. It often takes longer.

[fol. 126] Q. Was she outfitted as quickly as she could be under the conditions then existing?

A. She was.

Q. Can you tell us approximately the size of the break in the hull of the Integrity, the extent of it?

A. My recollection is that it extended from the bow to midships on the port side,—it took in about three plates from the bow aft and from the deck to the keel.

Q. And were the frames damaged?

A. Yes, the frames were damaged, all of them.

Q. And approximately how far inboard did the damage extend?

A. The fireroom bulkhead was buckled in for a distance of about two feet.

Q. A considerable number of the items mentioned in the survey report were necessary only for the purpose of getting at the damaged parts, were they not, removals and replacements?

A. The majority of items were actual removals made necessary to repair the damage and install the renewals.

Q. You mean the removal of damaged material.

A. Yes, damaged material. It should be kept in mind that the bulwarks on the boat were stove in, the rail lay up against the house, the deck was buckled and the manholes were all broken over the coal bunkers.

Redirect examination.

By Mr. Matteson:

Q. Mr. Kilpatrick, you said something in the record a few minutes ago about the time required to get up steam on one of these boats after it has been laid up for a considerable period—will you state that again on the record?

A. A boat that has been laid up for any period during the [fols. 127-130] winter months requires from 12 to 14 hours to get up steam so as to avoid the risk of rupturing furnaces or damaging plates in the boiler.

Q. That is, you have to do it gradually, due to the expansion and contraction that takes place.

A. Yes.

Q. The rate of $150 a day which you are claiming for demurrage, that is your opinion as to the market value of the use of a tug of this type at that time?

A. That is the price we would have to pay and did pay.

Q. That is the going market rate?

A. Yes, that is the price we did pay and do pay, and are paying now.

Q. The float in tow of the tug Integrity at the time of this accident was N. Y. Central carfloat No. E61?

A. Yes.

Q. That float was under bare boat charter from the New York Central to the Brooklyn Eastern District Terminal at that time, was it not?

A. Yes, sir.

Hearing adjourned, date to be set.

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[fol. 131] RALPH J. FRANK, being duly sworn as a witness for the libellant, testified as follows:

Direct examination.

By Mr. Matteson:

Q. Mr. Franks, in September to December, 1920, were you connected with the firm of Alley, Eells & Company?

A. I was.

Q. In what capacity?

A. I was their outside checker and auditor of marine repair bills.

Q. And in that capacity did you supervise the repairs to the tug Integrity?

A. I did, from a cost plus standpoint.

Q. I show you this document marked Libellant's Exhibit 3 and ask you if that is your signature appearing on the last two pages as part of the stamp, checked and passed, Alley, Eells & Co.?

A. (Examines document.) Yes, that is my signature.

[fol. 132] Q. What is that document?

A. That is the corrected repair bill rendered by the Vulcan Iron Works for repairs performed on the steamtug Integrity.

Q. Will you explain to us just what your work was in connection with supervising and checking those repairs and eventually approving that repair bill?

A. We had two men down at the plant of the Vulcan Iron Works in October, 1920, until she was completed sometime in December. One man was outside entirely and the other man was both outside and inside—by inside I mean working in the shops. We had the man on the outside come down five minutes before starting time and station himself at the gangplank to the dry dock and as every employee of the Vulcan Iron Works came on board that dry dock his number was taken and about ten to fifteen minutes after the work was in progress he would go around and check up to make sure that the men that came on the dry dock were actually at work, and during the course of the day he would go around and make a check on the men four times outside of the lunch hour check. That would be, he would go around about ten o'clock in the morning or 9.30 in the morning and about quarter of twelve and then he would check them as they go off the dry dock at noon and then he would check them as they came back at one and then in addition to that he would check them twice in the afternoon and check them off when they knocked off work for the day. The man that was inside he would cover all the shops where work was being done, keeping a record of the number of the men that were on the job, or perhaps the machines used, when the machine [fol. 133] was started and when it was completed. Some-

time during the day he would go upstairs to the office and would check out with the cost clerk of the Vulcan Iron Works the time expended the previous day. Also he would check out the material. I forgot to add that the outside man would check the material and tools that were used on board the vessel such as air drills, riveting hammers and acetylene torches.

Q. What part of the work did you personally do?

A. I was inside and outside.

Q. Were there two others in addition to yourself?

A. One other.

Q. You changed off, inside and outside?

A. No, I was in the shop mainly and then I would come out from time to time and check around to see what was being done and follow up with my specifications.

Q. Who made the daily checks with the office of the Vulcan Iron Works?

A. I did, personally.

Q. And did that continue throughout the time the work was being done on the boat Integrity there?

A. The entire time the work was going on.

Q. Did you do anything beyond simply keeping track of the work that was done with a view to reducing costs or expediting the work?

A. Yes, many a time we would come on the vessel and I would see men standing around and I would get in touch with the yard superintendent and tell him "you are doing this job with extra men; some will have to get off" and some of the time there were parts of the vessel they were not working on and which needed work, and I would sug- [fol. 134] gest that they put a couple of men on here to burn out rivets and the like of that.

Q. What were the conditions at that time with respect to the efficiency of labor in their repair yards?

A. Fair, I would say. They would not break their necks working but they would keep at it if you snapped the whip over them at all times.

Q. According to your observations were conditions any better or worse in this yard than in others that you came in contact with?

A. About the same. Things were pretty busy in the ship repair industry at that time.

Q. As a result of information which you obtained through this process of checking did you check over the repair bill as finally presented?

A. I did.

Q. And this document here that you have, is that the way it was first presented?

A. No, sir.

Q. When it was first presented how was it different from that?

A. The cost of it was much higher.

Q. And what did you do?

A. We had an argument with the Vulcan Iron Works that lasted over a day on various reductions that we demanded, such as the charge on the use of blow gas tools. They wanted to charge eight hours a day because a man had it for eight hours but we showed them he couldn't use it for eight hours. That was a physical impossibility for a man to work solidly eight hours on an acetylene torch and we finally compromised on five hours for over eight hours of labor.

Q. And then was the bill reduced accordingly?

A. Yes.

Q. Is this the form in which it was presented?

A. This is the second bill revised after we had ques-
[fol. 135] tioned various items as to labor and the like of that, because we had agreed with the cost clerk every single day as to various items. We would work it out then and there while everything was fresh in our minds as to what charges were proper and what were not proper. At that time they were charging us for the services of two general foremen as I recall and we told them that belonged as part of their overhead. These men could not be charged to any particular job. They were supervising every job in the yard and their supervision meant nothing more than going on board and looking around and seeing how the work progressed.

Q. Then as a result of this checking of the bills and of the information obtained in supervising these repairs, etc., did you finally pass this bill for payment?

A. I did.

Q. And in your judgment does that bill represent the reasonable cost of repairing the Integrity under these circumstances?

A. It does, yes.

Q. Can you tell us, by referring to the bill or otherwise, when the repairs began and when they were completed?

A. (Refers to bill.) They were started on October 8, 1920, and they were completed on December 15, 1920.

The Commissioner: Do you recall roughly how much you struck off the original bill?

The Witness: I would say about $3,000.

Q. Mr. Frank, with respect to the time that was taken to perform these repairs can you tell us whether in your judgment that was the time reasonably required under the [fol. 136] circumstances to make those repairs?

A. Yes; I don't think they could do it any quicker in view of conditions of the yard and the situation of the boat.

Q. You don't know anything about the payment of Alley, Eells & Co. bill in this connection, do you?

A. No, I do not.

Cross-examination.

By Mr. Wythe:

Q. What has been your experience with marine work?

A. In 1916 I went with Shelter Island in the purchasing department. When I left them in the middle of 1917 I was the assistant purchasing agent, and I was buying all sorts of material for the construction of vessels with the exception of the big machinery which was let out on contract by the chief purchasing agent. During the war I was in the Navy and after that——

Q. What were you doing in the Navy; what branch of the service?

A. I was in the cost inspection.

Q. And after that?

A. After that I joined in with Alley, Eells & Co. We made a specialty of auditing marine repair bills, using blue prints of the job to be performed and working it out in conjunction with the blue prints and the time cards and also checking costs of vessels as the work was progressing.

Q. Now in this particular job on the tug Integrity, did you make any check of the cost of the materials used?

A. As far as the cost of materials went, we had no business going into what they cost, but from what at what they

call port rates. When they put it on time and material we had a uniform rate for material.

[fol. 137] Q. What do you call port rates—what do you mean?

A. I believe there was an association in the Port of New York, that the shipyards got together and they all charged the same rate for machinists, boiler makers, carpenters, riveters and the like.

Q. That is labor costs?

A. Yes, labor costs.

Q. Did you check the bills against those labor costs to see whether they were charging more than the port rates?

A. Absolutely.

Q. How about material used?

A. They furnished us with a list, I believe, of what they were going to charge for iron and the like of that and so much for wood and so much for each machine used.

Q. What did you check that against?

A. You mean as far as the cost of it was concerned?

Q. Their agreement and what they were charging for material on the job?

A. We checked the invoice bill against the record of materials we had as going on the job.

Q. How did you check against the price charged for the material used?

A. Against their price list.

Q. The price list they furnished you?

A. The price list they furnished us.

Q. So you knew whether the price list they furnished you was greater or smaller than that charged elsewhere?

A. No, it wasn't any greater or any smaller—just average, about the same.

Q. Was that examined and checked with the price list?

A. Yes.

Q. By Alley, Eells & Company?

A. By our office.

Q. So that you had them covered on the prices of material used and the prices of the labor as well as what was actually used on the job?

A. That is true.

[fol. 138] Q. You say you saved approximately $3,000 from what was originally charged on the bill?

A. If we were to let them go ahead and charge what they wanted to charge at the time there would be a fair labor saving from what we, for instance, they put in a figure for a couple of general foremen, that we wouldn't stand for and never put it in the bill, and as I told you, we argued every day about certain men going on and certain men not going on.

Q. When you say, "never put it in the bill" do you mean the first bill?

A. Yes.

Q. I take it for granted that all of your objections were brought to the attention of the yard?

A. Absolutely.

Q. You never found them undercharging themselves?

A. No.

Q. You answered a question of Mr. Mattison's that you didn't think they could have done the work quicker because of the conditions at the yard and the situation of the boat —will you explain what you mean by conditions at the yard?

A. The location where the boat was. If you know the Vulcan Iron Works—the Morris Canal runs through their plant and the boiler shop and the machine shop were on the north side of the canal and the tug was on dry dock on the south side of the canal and every time you wanted some piece of something from the shop, that is, steel, or a keg of rivets you had to go across in a little scow pulled over by hand, but if a tug was running up the Morris Canal and they saw it may be 500—600 feet away—they would have to wait until the tug went up and the swell went down and sometimes that would be a wait of eight, nine, ten minutes, and sometimes the scow would be one side and you would [fol. 139] have to wait till they came over from the opposite side.

Q. That delayed the job considerably?

A. Yes.

Q. Was there any other part of the yard where this condition could have been avoided?

A. If they were put in the other dry dock but as I recall it when we went over there all the other dry docks were in use. I believe that was the only dry dock available at the time. She was put in there for the original survey.

Q. If these conditions and the situation of the boat had been eliminated and another one of the dry docks could have been used or another yard could have been used there would have been some saving of costs?

A. I believe so.

Q. How much could have been saved?

A. That I could not say, but I know it would cut down the cost and it would cut down the length of time.

Q. Did you ever see the original bids on this job by the different yards?

A. No, sir, never saw them.

Q. You are not a marine engineer, yourself?

A. No, sir.

Q. You never do estimating?

A. No.

Q. But it is your opinion that with an ordinarily efficient yard, from what you say, the time could have been reduced considerably? A. I would say it could be reduced. I will also say these conditions were in all yards at that time. The yard was very crowded.

Q. Most all of the yards?

A. Yes, at that time.

Q. Did you ever check any work of this sort that was not being done on a cost plus basis, being done on contract basis or any other way?

[fol. 140] A. If I ever checked any work on a contract basis? No. There wouldn't be any need for it.

Q. All your work has been on a cost plus basis?

A. Yes, but sometimes we have been on jobs where the contract job was running along at the same time as a cost plus job, that is, they would let out contract and they would find some extras coming up and they could put these extras out on a cost plus basis, port basis, day's rate basis.

Q. In your experience did you ever find any difference in the safety of a job when done on contract or cost plus basis?

A. No.

Q. You don't think they work faster on a contract job; I mean, if they are let alone?

A. That is a different story—if they are let alone—but if you are standing over them all the time, no.

Q. The record in this case shows that the original bid of the Vulcan Iron Works was 30 days on this job; as a

matter of fact, the work did take about 68 days—can you give us any reason in your opinion for that large discrepancy?

A. No, I can't say—I don't see how they could do it in 30 days, the way the work progressed and the way the work was carried out.

Q. The work could have been carried out differently, as you have already stated, if they had it in a different dry dock and gone about it differently?

A. That is right.

Q. It could have been done more quickly?

A. Yes.

Redirect examination.

By Mr. Matteson:

Q. You have said of course that the work could have been done more quickly and perhaps more cheaply if an- [fol. 141] other place more convenient to do the work had been available. Have you any reason to believe there was any such place available?

A. Not at the time that work was going on.

Q. Then were the delays and expenses due to the position of the boat in your opinion unavoidable?

A. Unavoidable, under these circumstances.

Q. How many men did Alley, Eells & Co. have actually on the job?

A. We had two men on the job at all times and then occasionally Alley would come over and Dummerford would come over but they would do nothing—just drop in and see how things were going and say "How are things going" and "having any trouble with the yard?"

Q. Are you familiar with what was done on the office end of the work?

A. In what way?

Q. I assume that what you did on the job—was that all Alley, Eells did, or was there more done in the office?

A. In the office we would take the bill and compare it to our own records. That would all have to be done in the office.

Q. Was there work done in the office outside of what you have described as what you and the other man did on the outside, or don't you know?

A. I really couldn't say as to that. I handled the bill for the entire job, right from the start to the finish. I checked up the final bill, as it was rendered, and saw they prepared the records I had billed along with the other man that was helping me.

Q. Do you know anything about a conference that was held between someone from your office and the Brooklyn Eastern District Terminal and officials of the Vulcan Iron Works?

A. I knew there was a conference but I didn't know the particulars.

[fol. 142] Q. You didn't know what took place?

A. No, I didn't know what took place.

By Mr. Wythe:

Q. Who was this other man who worked on this job with you?

A. Brock.

Q. He was the outside checker?

A. He did nothing but check the outside.

Q. Do you know what experience he had had with such work?

A. I couldn't say off-hand. He came with us about six months before and he used to go out on small jobs. Occasionally he went out to Rockland on the East Coast Fishery work. That is about all.

Q. You were more experienced in that line than he was?

A. That's right; although he did have some technical training; he went to the school, I think of naval architecture for a year. Then the war broke out and he joined the Navy and came with us after he got out.

Q. When you finished checking over this bill and signed it were you entirely satisfied with the cost of that job as a whole?

A. I was.

Q. I notice this stamp that you have put your signature on says "checked and passed"—was that the usual form of approving?

A. That was the usual form of office bill that we had.

By Mr. Matteson:

Q. The firm of Alley, Eells & Company ceased to do business or ceased to operate about 1923, in the summer?

A. The summer of 1923—June.

[fol. 143] Q. And by whom are you employed now?
A. The Constitution Indemnity Company, Philadelphia.
Q. Did you come over from Philadelphia, at my request?
A. Yes.

By Mr. Wythe:

Q. Do you know what Alley, Eells charged on this job?
A. I haven't the slightest idea.

Mr. Matteson: On production of the original checks it is conceded that the repair bill was paid by the Brooklyn Eastern District Terminal Company to the Vulcan Iron Works Company as follows: May 24, 1921, $5,700; June 10, 1921, $14,300; June 20, 1921, $3,614.57.

(The hearing was thereupon adjourned to meet at the convenience of counsel.)

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[fol. 144] Hearing held on June 19,1930, at 2 P. M., at the office of the Commissioner, 11 Broadway, New York.
Appearances: As before.

FRANK MUNNELLY, called as a witness on behalf of libellant and duly sworn, testified as follows:

By Mr. Matteson:

Q. You were captain of the tug Integrity at the time of this collision with the dredge Raritan?
A. Yes, sir.
Q. When the collision occurred what happened to you?
A. I was thrown in the water, thrown overboard.
Q. Were the lines between the tug and the float parted?
A. Yes, sir.
Q. Was anybody else thrown in the water, do you know?
A. A brother-in-law of mine, Frank Randell.
Q. Did you see him in the water?
A. Yes, I seen him in the water.
Q. Did you ever see him after that?
A. No, sir,
Q. How did you get out of the water?
A. I pulled myself out with a piece of the stern line that was broke from the tug, hanging in the water. I was

struggling around quite a while and all of a sudden I got hold of a piece of the rope and pulled myself out, that is all I can tell.

Q. You pulled yourself?

A. I almost went to the bottom of the river and when I [fol. 145] came up I was directly under the stern of the tug, under the fan tail of the tug.

Q. What was the weather at that time?

A. Hazy and blowing a pretty good gale. She had quite a list.

Q. What direction was the wind—do you remember?

A. Around northeasterly, If I am not mistaken.

Q. Was there any sea?

A. Yes, quite a sea.

Q. When you got back on the tug was there anybody else on the tug?

A. Yes, sir; there was a fireman, one fireman that was in the hold of the vessel; he didn't know what had happened. He was penned down below. I met him as he was coming out of the fireroom. As I came up on the tug and passed the fireroom door this man was coming out.

Q. Did you say something about a list?

A. Yes, she had quite a list on her.

Q. Which way?

A. I believe it was to starboard.

Q. Where was the tug hit?

A. On the port bow.

Q. Was there anybody else on the tug when you got back aboard except this fireman?

A. The police patrol had the tug in charge when I came back on to her—that was after I got off her the first time. When I got back the police patrol was alongside the tug.

Q. When you pulled yourself out of the water?

A. No, when I came out of the water I was right on my boat and the only man I saw around was the fireman.

Q. Where were the other members of the crew at that time?

A. They were on the carfloat.

[fol. 146] Q. And where was the carfloat?

A. She had drifted away in the Bay.

Q. The carfloat was loaded with cars?

A. Yes, sir.

Q. Box cars?

A. Box cars and coal cars. They were mixed.

Q. They present a pretty good surface to the wind?

A. Yes.

Q. Did the carfloat have much draft?

A. I should judge around five feet.

Q. Is that comparatively shallow?

A. Yes, sir.

Q. What was the tug drawing?

A. I just forget her depth.

Q. About how much?

A. I should judge about eleven and a half feet.

Q. When you got back on the tug the float had drifted some distance away?

A. Yes, sir.

Q. You had no crew except this one fireman?

A. No.

Q. Did you see the tug Agnes around there about that time?

A. Well, a little later than that time after I came out of the water and came to my senses, I seen the Agnes around there.

Q. Did you have any communication with her?

A. I guess I told him to assist and take charge of the float and do what he could to save her from drifting into the Anchorage or doing any other damage.

Q. Were you able to operate the tug with only one fireman on board?

A. No, sir.

Q. Was the float and her cargo of cars and contents in any danger at that time, would you say?

A. Yes, they were liable to go into some of the boats at the Anchorage; liable to drift into most anybody coming up the Bay there.

[fol. 147] Q. You say there was a pretty strong wind?

A. Yes.

Q. About where in the Bay did this collision take place?

A. Off Red Hook flats, about the red buoy.

Q. Near the red buoy?

A. Yes, a little distance west from that.

Q. Is that above Greenville Channel?

A. Red Hook Flats is opposite Greenville Channel—runs from Erie Basin down to a point off Robbins Reef.

Q. What I was trying to find out was whether this point where the collision took place was above a point abreast of Greenville Channel?

A. Above or below?

Q. Was it above or below, or where?

A. I don't know as I could answer just that question.

By Mr. McCloskey:

Q. On which side of the Anchorage out towards the main ship channel or inshore towards Brooklyn?

A. It was towards Brooklyn from the main channel.

By Mr. Matteson:

Q. That was on the Brooklyn side of the main channel?

A. Yes, on the Brooklyn side of the main channel.

Q. Did you examine your tug after you got aboard to see what her condition was; did you look over her to see what damage had been done by the collision?

A. Yes; there was a hole in her port bow just above the [fol. 148] water line, the deck was all buckled up, all knocked in, the iron plates on her bow crushed in.

Q. With a hole of that description in her bow, in your opinion, would it have been safe or practicable for the tug to have attempted to tow the carfloat herself?

A. I don't think so, under the conditions of the sea—on a calm day you might take a chance, but a pretty good sea was running that day.

Q. What happened after you found yourself on the tugboat with one fireman—who else came on board?

A. I went up to the Raritan, the United States dredge boat, and I asked the different questions in regard to the accident; I asked him why he wasn't at the wheel; the captain said he was at the wheel.

Q. You mean you navigated the tug?

A. No, sir; when I got out of the water the Raritan was stuck in her port bow and I got up on the ship on this little steam lighter line to have a talk with the captain in regard to this accident and while I was up there the tug broke away from the ship; that is how it happened; we had to have a motor boat to get back to the tug, so I told the cap-

tain of the dredge to give me an engineer and a sailor and a fireman to assist me—his man had a government license—to examine the fire-room and see if it was all right, while I looked over the hold.

Q. Did he do that?

A. Yes, he did, as near as I could see.

Q. Did the captain of the Raritan assign men to you?

A. Yes.

Q. And how did you get on the tug?

A. We lowered a boat down—we got into it—some of [fol. 149] us—the others came down the ladder—I don't know how they got down—they got down somehow.

Q. You went over to the tug in this motor boat?

A. Yes.

Q. What did you do there?

A. I told the engineer to look over the pumps and all the details to see if anything was gone, and we tried her out and I would look over the equipment on deck, the rudder, etc., to see if we could steer the vessel.

Q. Did you find you could operate her?

A. I looked her over and found I could operate her all right.

Q. What did you do then?

A. I started to go for the carfloat to see how my crew was.

Q. Did you reach the carfloat?

A. Yes, and I got the crew off the carfloat.

Q. Was anybody in charge of the carfloat at that time, any tug or any other vessel in charge of the carfloat at that time?

A. I can't just remember, but I believe the Agnes. It was a steamlighter and the Agnes, but I don't know which one had her in charge.

Q. There were these two vessels there?

A. Yes.

Q. Did you get your crew off?

A. Yes, sir.

Q. What did you do then?

A. I told him to take the carfloat to a safe point in Brooklyn and tie her up.

Q. At that time did you consider that it would have been safe or practicable for you to have attempted to tow the carfloat to the Anchorage?

A. No, sir.

Q. Why?

A. The way the sea was she was liable to ship water in the hold and I didn't know how the steam pumps were, [fol. 150] whether there was any flaws in them after the accident there might be something that might let go.

Q. Where did you go with the tug?

A. I took her to North Eighth Street, Brooklyn.

Q. How did you get there?

A. On her own steam.

Q. Did you go along the Brooklyn shore?

A. Yes.

Q. The lee shore?

A. Yes.

Q. And you got there all right?

A. Yes, I got there all right; we were running very slow though.

Q. I should like to know whether in your opinion the services rendered to the float and her cargo by this boat Agnes and the other boat were necessary?

A. Yes, they were necessary under the conditions of the weather.

Q. I want to ask you about the fireman who was never seen again. Did you see what happened to him?

A. When I saw him, he was running on the carfloat—that was when I was thrown overboard—I seen him running on the carfloat; he was running to the end of the float, the way I figured he was afraid the cars were going to tumble over on him so he was running toward the stern of the float.

Q. Then what happened?

A. At that time she struck and I was just going to jump from the tug to the carfloat and I was thrown in the water.

Q. Did you see what happened to Randell?

A. I saw him going down and I went down too, but I could swim.

Q. Could he swim?

A. No, sir.

Q. Did you see him come up again?

A. No, sir.

Q. Was Randell some kin of yours?

A. He was married to my wife's sister.

[fol. 151] Q. Do you know what his age was at that time?

A. I believe he was 27 years old at that time.
Q. Was he married?
A. Yes, sir.
Q. Was his wife living?
A. No. sir.
Q. How long before that did she die?
A. About six months.
Q. And were there any children?
A. Yes, one.
Q. Was it a boy or girl?
A. One little boy about two years old at that time.
Q. What was his name?
A. His name was Frank, called after his father.
Q. Was he sometimes called Francis?
A. Yes.
Q. Randell was working on the Integrity as a fireman?
A. Yes, sir.
Q. What did the engine-room force of the Integrity consist of?
A. Two firemen, one engineer.
Q. And Randell was one of the two firemen?
A. Yes.
Q. Do you know what pay he received?
A. At that time?
Q. Yes.
A. About five and a half or six dollars a day.
Q. And was that for a straight day's work?
A. That was just a regular day's work, ten hours, I believe, or eight.
Q. Were you working overtime in those days?
A. Yes, sir.
Q. Six days straight time would be $36 a week—do you know Randell's average earnings per week, including overtime?
A. I guess about $50 or $60—in that vicinity.
Q. Did Randell do anything on the boat beside shovel coal?
A. He did everything in general, oiling and cleaning up. [fol. 152] Q. Did he have anything to do with operating the engines at that time?
A. The engineer let him do that, but he wasn't supposed to.

Q. Had he a license?
A. No, sir.
Q. Was he trying to get a license?
A. Yes.
Q. Was he intending to procure a license in due course?
A. Yes.

By Mr. McCloskey:

Q. What was the state of Randell's health, so far as known to you?
A. All right, as far as I know.
Q. What was his physique—was he tall was he husky or weak?
A. He was about six feet tall, strong; I didn't know him to be weak—strong as far as I know.

By Mr. Matteson:

Q. Had he ever been sick as far as you know?
A. Never knew him to be sick in the time I knew him.
Q. He appeared to be well?
A. Yes, sir; he was a fellow from the other side. He wasn't brought up with me or anything like that.

Cross-examination.

By Mr. Wythe:

Q. You testified today, I have in my notes, that the wind was northeast—are you sure about that?
A. As near as I can remember.
Q. You testified at the trial, didn't you?
A. Yes—I might have made a mistake.
[fol. 153] Q. On the trial you said the wind was a little east of south, blowing you toward the Jersey shore on your starboard hand?
A. On my testimony I must be right. It must be southeast, instead of northeast.
Q. On page 14 of the trial minutes I will read you these questions and answers to refresh your recollection:

"Q. Was the wind coming from the south or southeast at that time?
A. Well, I called it a southerly wind that day.

Q. It wasn't east of south; southeast?

A. Well, it may be a little bit east but it wasn't much; slightly.

Q. There was a strong wind and kicking up quite a sea?

A. Yes."

Q. Do you recall testifying that?

A. Well, I guess it is about right.

Q. As a matter of fact, you were coming up the bay in a northerly direction and you were making leeway somewhat toward the Jersey shore; do you remember you had to use your helm to offset leeway, so that the tendency of the wind was to set you toward the Jersey shore?

A. Yes.

Q. South or south by east?

A. Yes.

Q. It was an ebb tide?

A. About the first of the ebb tide.

Q. I think you said it had been running ebb about half an hour.

A. That is what we call the first of the ebb, about the first hour.

Q. The carfloat wasn't damaged by the collision, was it?

A. I don't believe it was, no.

Q. The dredge hit the tug, not the carfloat?

A. Yes, it hit the tug.

[fol. 154] Q. As I understand it, the dredge went between the tug and the carfloat, parted the lines?

A. Why, no; it hit the tug on the port bow.

Q. On the port bow?

A. Yes. If he went between——

Q. But he parted the lines—separated the two?

A. Yes.

Q. Have you any idea how long the tug and the float were adrift after the collision before the float was taken in charge by the Agnes?

A. No, I haven't any exact time as to that.

Q. Can you give any estimate as to how long they were drifting before they were taken in charge again?

A. I don't know—probably half an hour or so.

Q. Where was the carfloat when the Agnes finally took her in tow? Had she drifted in from her original position?

A. Yes, she drifted quite a way.

Q. What anchorage were you talking about when you said she might drift into the anchorage?

A. There was an anchorage on the west side.

Q. Was she over near that anchorage at the time the Agnes got her?

A. I don't know where she was when he got her—I don't know what location. I was overboard.

Q. When the Anges took her in tow you weren't overboard. You had already been on your tug and inspected the equipment and gotten your crew off the carfloat. When you went and got your crew off the carfloat and told the Agnes to take charge, what was the location of the Agnes then with reference to the anchorage?

[fol. 155] A. I don't know where she was; I didn't take much notice of her where he got hold of her.

Q. Did the Agnes have lines on her when you finally got over to take your crew off?

A. I believe so.

Q. Are you sure of that?

A. She must have had them or I would have to try to do something myself with the float.

Q. The Agnes wasn't towing her though till you told him?

A. He had hold of her.

Q. He asked you what to do?

A. He said he couldn't buck the tide to North Eighth Street, so I told him to bring her to a safe port in Brooklyn and tie her up, and notify the office.

Q. That is the time I am speaking of—what was the location then, over near the anchorage ground?

A. I think we were about in the middle of the Bay.

Q. Then there was no danger of her drifting into the anchorage?

A. Not as long as the Agnes had hold of her.

Q. It would take some time for her to drift into the anchorage from out in the mid-channel, wouldn't it?

A. It would take a period of time.

Q. Was there any danger of the float drifting over and going aground on the flats if nobody took her in tow?

A. No, sir; I don't think so.

Q. Over on the Jersey flats?

A. On the Jersey flats? Yes, she would go over there.

Q. In time she would have drifted over there and grounded?

A. Yes.

By Mr. McCloskey:

Q. Was this float broad side to the wind?

A. At the time she got hit?

[fol. 156] Q. At the time she was drifting around?

A. I don't know how she was then—drifting around—I didn't take notice of her.

By Mr. Wythe:

Q. You say the Integrity was not leaking when you inspected her—you found she was not taking any water?

A. Yes.

Q. You were able to work her under her own steam?

A. Yes.

Q. You did go over with her to the carfloat to get your crew off the float?

A. Yes, sir.

Q. Did you put any lines on the float at all at that time?

A. No, I don't believe we did.

Q. If necessary you could have made fast to the float and prevented her from drifting, couldn't you?

A. If the boat didn't have I could—I would have taken her and tried to do the best I could.

Q. You think you could have managed to get her to a position of safety?

A. I would do all I could. Whether I could or not I don't know—I would do the best I could.

Q. Your engines were working all right?

A. They were.

Q. You were steering all right?

A. Yes.

Q. And not taking in any water.

A. Not taking in any water. I believe there was a small leak but it didn't amount to anything, the engineer told me.

Q. You say this man who was drowned was on the carfloat at the time the collision happened—is that right?

A. That is where I seen him.

Q. He was running toward the stern of the carfloat?

A. Yes.

[fol. 157] Q. And he was fireman on the tug?

A. Yes.

Q. Then his proper place was on the tug and not on the carfloat—that is where he worked, isn't it?

A. Yes, he was working on the tug.

Q. And he went on the carfloat because you ordered the whole crew to go on the carfloat before the collision? Is that why he went on?

A. I ordered them over?

Q. You testified at the trial that before the collision you told everybody to get on the carfloat?

A. I told them to jump if they saw any danger.

Q. You told the whole crew to board the carfloat before the collision?

A. Not before the collision.

Q. They were on the carfloat before the collision.

A. They jumped over themselves.

Q. Without any instructions from you?

A. Yes, they jumped over without any instructions from me.

Q. And I understand you were the last one to jump over, but you didn't get there; you were just about jumping when the collision happened?

A. I was trying to get over.

Q. Are you quite sure that you did not tell your crew to go over on the carfloat?

A. I don't remember telling them to go on the carfloat.

Q. On your testimony at the trial, page 10, the question was asked:

"Q. Did you tell the men what to do to avoid injury?

A. Yes. I gave them orders to get on the coal cars for safety at that point, when I saw her swinging into us."

Do you remember testifying to that?

A. When she got hit, but you said before the accident.

Q. The men were on the carfloat and you were the last [fol. 158] one trying to get on. If they were ordered to get on it must have been before the accident when the orders were given. What I want to get at is whether those men who went on the carfloat went there of their own accord or because you told them?

A. Some of them jumped of their own accord. I might have told some to jump there for safety when I seen her going to collide into me.

Q. Certainly the engineer and firemen would not jump of their own accord without somebody telling them. They would not see the other boat coming?

A. They could look out and see her coming. They generally do take a look every once in a while.

Q. You don't recall whether you told them to get on the carfloat or whether they did it of their own accord?

A. I would have given them a warning if they seen any danger to jump. I just can't recall now but I might have given them a warning if they saw any danger—if I testified to it.

Q. And before the collision happened when you got in close quarters you left your pilot-house and went on the lower deck and were just about jumping on the carfloat yourself when the collision happened?

A. Yes. They were all hollering for me to come on over.

Q. And with the exception of one fireman you were the last to leave the tug?

A. Yes.

Q. And where were the rest of the crew on the carfloat, if you know, when the collision happened?

A. They were there on the coal car.

Q. They were not in the same place that this other man was that was drowned, Randell—was he in a different place from the rest of them?

A. I believe he jumped over with them and ran back on [fol. 159] the tug—whether he had money on the tug or not I don't know, but when I seen him again he had left the tug and was over on the carfloat running toward the stern of the float and when it hit it jarred him off the end.

Q. Then he was in the act of getting on the carfloat the second time when he was knocked overboard?

A. I believe he was.

Q. You didn't tell him to get back on the tug again at that time?

A. No, I don't remember telling him. I was watching straight ahead at that ship. The engineer blew up something into the speaking tube and I couldn't answer him, it was that close.

Q. That tug had her engine stopped before the collision, didn't she?

A. I believe she did.

Q. The engineer stopped them prior to leaving the engine room?

A. He stopped everything and jumped over on the float with the rest of them, when he saw that Raritan back.

Q. Before you left the tug, before you made your jump, did you see these men up on the coal cars—did you see whether they were on the float or on the cars?

A. I think I did, yes, I think I saw some of them on the coal car or any place they could hang on for safety—some on the car and around in different ways.

Q. As it turned out it would have been as safe for those men to stay on the tug?

A. As it turned out, but the fellow that was on the boat—a big tool box fell on his head from the grating on the engineroom.

Q. There were not any rails or anything to hang onto on the carfloat?

A. The life line there—it is a kind of cable through those iron stanchions.

[fol. 160] Q. Where was that—on the outside edge of the float?

A. The outside edge of the cars, not on the carfloat.

Q. There was a footway outside of that?

A. There was a footway outside of that—outside of the rail.

Q. Was there nothing between the footway and the water to prevent a man falling off?

A. They had those towing cleats.

Q. They wouldn't take the place of any rail or lifeline to prevent a man going over?

A. No; it would be pretty hard to grab them.

Q. They would be more likely to trip a man?

A. Yes.

Q. So that if a man is on the footway or the deck of the float and the float is shaken by a collision or other shock the only way for the man to protect himself is to grab that inboard lifeline?

A. Yes.

Q. You testified on direct examination that the tug was listed to starboard, was that after you got on her?

A. After the collision, yes, sir.

Q. And at the time you came aboard from the water was the police patrol alongside there?

A. No, not at that time.

Q. When was it that the police patrol came alongside?

A. After we broke away from the Raritan. The tug got loose from the Raritan while I was on the deck of the dredge Raritan.

Q. Shortly after the collision there were, beside the dredge, the police patrol, steamlighter, and the tug Agnes in the vicinity, is that right?

A. Yes.

Q. Were there any others that you know of that came up?

A. I cannot just recall now. I don't know if there was or not.

[fols. 161-173] By Mr. Matteson:

Q. Randell was a good reliable man, was he?

A. Yes.

Q. Did he take good care of his family?

A. Yes.

Q. Did he use his earnings for their support?

A. Yes.

By Mr. Wythe:

Q. With regard to Randell's salary you stated that you guessed he averaged $50 to $60 a week—have you got anything more definite than a guess?

A. That is the way the overtime runs—sometimes you get it—sometimes you don't. Sometimes it is $50 and sometimes $60—that is the way he generally used to have it on his pay envelope.

Q. Did you see the pay envelopes?

A. Yes.

Q. That would be an average statement of what he was getting—between $50 and $60 a week?

A. Yes.

By Mr. McCloskey:

Q. Did you distribute the pay envelopes?

A. Yes.

(Witness excused.)

(Hearing adjourned to July 10, at 2.30.)

[fol. 174] Hearing held at the office of the Commissioner, 11 Broadway, July 22, 1930, at 2.30 P. M.

JAMES B. ALLEY, being called as a witness on behalf of libellant and duly sworn, testified as follows:

By Mr. Matteson:

Q. Were you a member of the firm of Alley, Eells & Company in 1920 and 1921?

A. It was a corporation and I was an officer of the corporation.

Q. What officer were you?

A. President.

Q. Do you remember the firm doing certain work in connection with the supervision of the repairs on steamtug Integrity?

A. I do.

Q. Do you remember the amount that was charged for their services in that connection? You may refresh your recollection from these documents?

A. $2,500.

Q. And was that bill paid by the Brooklyn Eastern District Terminal Company and its underwriters?

A. It was paid, but I don't recall who paid it—the individual—it was divided between the underwriters and the Brooklyn Eastern District.

[fol. 175] Q. Can you tell us how Alley, Eells & Company, Inc., came to be called in in connection with this job and just what they were supposed to do—what the situation was at that time that called for their services?

A. Right after the war conditions in New York Harbor and getting repair work done were rather difficult. The underwriters felt that the shipyards were overcharging them for a lot of their work. There was a feeling on the part of some that a shipyard would agree to do work for an insurance company at a higher rate than they would do it for the owners; that a job would be surveyed specifying the work to be done and only the necessary items of work would be done and the other items left undone, leaving the boat in a worse condition than it would have been if the work had been properly done, thereby increasing the hazard of the risk. And there were many talks between representatives of my firm and the insurance companies about the advisa-

bility of doing certain work on a time and material basis, having the work properly supervised by men who were competent to supervise the work from a technical and cost standpoint. The shipyards were doing work for various private shipowners and from time to time work was given to our firm by the underwriters when they thought that they were not getting a satisfactory price from the shipyards. We were used more or less as a club over the shipyards' heads because they did not want to have anyone in their yard checking up their workmen. When this job was surveyed there was a difference of cost between the surveyors as to the probable cost of the work. We had several talks with Mr. [fol. 176] Havemeyer of the Brooklyn Eastern District Terminal Company and Mr. Bagger, one of the insurance surveyors, and I am not sure by whom, but it was decided this would be a good job to put in the yard on time and material basis with supervision.

Q. You were employed to do that?

A. Yes.

Q. Did you fix the amount of the charge, $2,500?

A. I am not sure whether I personally did. All bills before they were rendered were approved by me.

Q. And what did that charge include?

A. It included the cost of surveying the job, to supervise all the work, to see that the work was done in accordance with the specifications, checking of the cost and the allocation of charges between the company and the underwriters and the final approval of the bill as rendered by the shipyard.

Q. And that included all expenses, did it?

A. Yes.

Q. And in your opinion was that a reasonable charge for services rendered in that case?

A. Yes.

By Mr. Wythe:

Q. Who was it that made up the amount of your bill, do you recall?

A. No, I am not sure now.

Q. Do you recall how it was figured up?

A. No. The way we generally figu-ed these bills was to take the actual amou-t of time put in, the difficulties encounte-d with the shipyard and if a particularly good job was

done we got a little more than we would have if an ordinarily satisfactory job was done.

Q. Did you ever fix your charges in cases like this on the [fol. 177] amount that you actually saved your client?

A. On various jobs, yes.

Q. Do you know whether any such consideration was taken in this case?

A. No, I am not sure.

Q. Have you seen or read over the testimony of Mr. Ralph J. Franks in this case?

A. No.

Q. He was your employee on this job?

A. He was employed by us and according to this bill was one of the men who worked on this particular job.

Q. You did no work personally on this job?

A. I was in the shipyard when the work was in progress.

Q. But you did none of the actual work?

A. No.

Q. Did you know at that time that the work on the tug Integrity had been let out for bids and bids received before you were called in?

A. My recollection is that a representative of our office attended the original survey. We frequently surveyed jobs for insurance companies.

Q. You do recall that different bids had been *met* out by different shipyards on this job?

A. I do.

Q. Can you recall now what the saving was over the best bid and the final bill as approved by you.

A. The only way I can recall is from the copy of the report we rendered to the underwriters when the job was finished.

Q. Can you refresh your recollection from that and tell me what the saving was to the owners of the tug?

A. For the work actually done for the underwriters there was $3,335.19.

Q. I do not quite understand what you mean by this. That was not the final bill as approved by you?

A. The final bill as approved by us was $23,614.57. In [fol. 178] that amount there is included extra items not included on the original survey which was the survey on which the yard figured the items totaling $1,099.76.

Q. This amount of $23,614.57 was the total paid the repair yard on that job after your supervision of the work?

A. Yes.

Q. And that bill was approved by you?

A. Yes.

Q. And in addition to that it cost the owners of the tug and underwriters, of course your fee of $2,500?

A. That's right.

Q. In calculating your fee was any consideration made of the total amount of the bill as finally approved—was your bill based upon that?

A. No, I can't say that it was.

By Mr. McCloskey:

Q. As I understand it, what you were charging for was your time spent and supervision given, seeing to it that it was a good job, rather than a charge for fighting down an excessive bill?

A. Yes; we figured that we were, and I think the underwriters considered us, good insurance for them to have because it kept the shipyards in line—that is what they used us for.

By Mr. Wythe:

Q. What I am trying to make very plain, the only thing that I am trying to do is to discover whether your fee was based strictly on time and services or whether you took into consideration the amount saved on the bill and the bigness of the job from a financial standpoint?

[fol. 179] A. I imagine that the results accomplished would be taken into consideration. We frequently did. But primarily each job had to stand on its own feet.

Q. As to the amount of time and labor put into it?

A. No, the general time and labor put into it and the difficulties in connection with the particular job done.

Q. That would determine your fee more than the results accomplished in saving the money for your clients?

A. Yes, unless frequently we took jobs on a percentage of what we saved. If this job had been done on that basis we would have gotten a half or a third or a fourth of the difference between what the job costs and the estimate survey price, but this job was not done on that basis.

Q. You were doing quite a good deal of that work?

A. Yes.

Q. What proportion of your work was done on the basis of a percentage of what was saved?

A. In number of jobs only one to two percent; in size of jobs done, probably 25% to 30%, considering the amount involved.

Q. So the majority of them would be a flat fee whether you saved anything or not?

A. Yes; all work done for the United American Line was done on that basis, time and expenses.

Q. Rather than percentage?

A. Yes.

By Mr. Matteson:

Q. I think you said in the amount of a bill which is approved by your firm there was included extra item not included in the original survey, totaling $1,099.76?

A. That's right.

[fol. 180] Q. Then in comparing the bill with the amount of the original bill we really should subtract $1,099.76 from the amount of the bill as approved, should we not?

A. Yes, sir.

Q. In order to make a fair comparison between the bid price and the actual cost?

A. Right.

Q. Then on that basis the cost as shown by the approved bill really showed a saving over the bid of this particular yard of about $3,335.19, assuming that the bid of this yard was $26,500, didn't it?

A. I think that is the figure I read. The lowest bid price according to my records was $26,500 and the actual cost of the work done that was included in the survey of $25,850 was $22,514.81, making a net difference of $3,335.19.

Q. I was not sure whether it was entirely clear in the answer that you gave, the object of your work, as I understand it, was two-fold, one to reduce costs, and the other to see that it was properly done—am I correct in that?

A. That's right.

By Mr. Wythe:

Q. In connection with the seeing that the work was properly done from a technical standpoint the underwriters and owners always have someone watching, irrespective of whether they employed you or not?

A. We frequently did that ourselves for underwriters.

Q. But irrespective of whether they employed you or not, it was always customary for the underwriters to have someone watching the progress of the work?

A. No. If the job was let on a flat price contract that is the last time the insurance inspector looked at the contract. [fols. 181-184] Q. There was no examination of the work on completion before it was accepted?

—. ——.

Q. Are you sure that was the practice at that time?

A. Yes.

By Mr. Matteson:

Q. I suppose in such cases as the owner felt the work had not been properly done there would be a kick?

A. Yes.

(Witness excused.)

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[fol. 185] AGREEMENT RE CLAIM OF CROSS-LIBELLANT

With respect to claim of the cross-libellant United States of America it was agreed that the claim of the cross-libellant consists of a single item, cost of repairs to U. S. dredge Raritan amounting to $2,230, and the respondent to the cross-libel, Brooklyn Eastern District Terminal, concedes that this item is reasonable in amount.

Government rests.

(Case closed.)

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[fols. 186-190] "NOTE.—Libellant's Exhibit No. 1 consisting of the report of marine surveyors, who examined the steamtug 'Integrity,' dated Jersey City, New Jersey, October 2nd, 1920, itemizing the damage sustained by the steamtug 'Integrity' due to collision with the United States dredge 'Raritan' has been omitted by stipulation of counsel."

[fol. 191] "NOTE.—Libellant's Exhibit No. 2, consisting of supplemental report of the marine surveyors, who examined the steamtug 'Integrity,' dated October 26th, 1920 amending their original report with respect to one item of damage, has been omitted by stipulation of counsel."

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[fols. 192-265] "NOTE.—Libellant's Exhibit No. 3 consists of the repair bill presented by Vulcan Iron Works, Inc. to the Brooklyn Eastern District Terminal, dated December 15th, 1920, showing the work done on each day between the dates of October 1st, 1920 and December 15th, 1920 to repair the collision damage to the steamtug 'Integrity,' and a supplemental bill dated January 28th, 1921, for certain work done on November 15th, 1920, and omitted from the original bill. The amount of the bill dated December 15th, 1920 is $23,526.32 and the amount of the supplemental bill dated January 28th, 1921 is $88.25. Both bills bear the notation: 'Seen and noted Mar. 18/21, Wm. R. Bagger' and the notation: 'Checked and Passed, Alley Eels & Co., by Ralph J. Frank, Feby. 14, 1921'" These bills are omitted from this record by stipulation of counsel.

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[fol. 266] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPORT OF SPECIAL COMMISSIONER

To the District Court of the United States for the Southern District of New York:

By the interloc-tory decree entered herein the 4th day of February, 1929, it was referred to the undersigned as Special Commissioner to take proofs and report the amounts of the damages of the respective parties. I was, accordingly, attended by Leonard J. Matteson, Esq., and W. M. L. Robinson, Esq., representing Brooklyn Eastern District Terminal, and Charles E. Wythe, Esq., appearing on behalf of the Government. Hearings were accordingly held on September 27, 1929, April 18, 1930, June 19, 1930, July 11, 1930 and July 22, 1930, and on several occasions

[fol. 267] dates were set for hearings but adjournments taken. The questions in controversy have been extensively briefed.

An Act of Congress authorized suit by Brooklyn Eastern District Terminal for collision damage "upon the same principles and measure of liability as in like cases in admiralty between private parties"—a formula that does not admit of the allowance of interest on the damages (Boston Sand & Gravel Company v. United States of America, 278 U. S. 41, 1928, A. M. C. 1851).

The steamtug Integrity owned by Brooklyn Eastern District Terminal left St. George, Staten Island, about 1 P. M., September 30, 1920, with New York Central carfloat No. 61 in tow on the tug's starboard side and, after an exchange of signals, was struck on the port bow by United States hopper dredge Raritan. This collision has been found due to the joint fault of the navigating vessels. Float No. 61, carrying cargo laden cars, was set adrift but was picked up by the steamtug Agnes which, with some assistance from the steamtug James Kay, berthed the carfloat. The Integrity's crew betook themselves in extremis to the carfloat and, on regaining his tug, the navigator of the Integrity deemed her condition too precarious for him to take the risk of handling a laden carfloat in some sea and wind. His judgment has been challenged but was, I believe, probably justified and certainly did not overpass the bounds of reasonable discretion. One of the members of the crew—the fireman, Frank Randall—after clambering upon the carfloat was precipitated into the water and drowned and the efficiency of the crew as a whole may well [fol. 268] have been impaired by the experience they had undergone. This consideration is a further practical reason in support of the captain's conclusion.

The salvage claims, after suit brought, were settled by Brooklyn Eastern District Terminal for $1250 and the death claim, after suit brought by the administratrix, was settled by Brooklyn Eastern District Terminal for $9,000.

Liability for salvage is on well settled principles an element of collision damage (The Charles G. Lister, 174 Fed. 288; La Champagne, 53 Fed. 398; The Cepheus, 24 Fed. 507) and the salvage settlement was not in excess of the probable recovery in view of the elements considered in fixing an award (The Blackwell, 10 Wall. [77 U. S.] 1, cf. The Highcliff, 271 Fed. 202).

The death claim was part of the damages caused by the collision and both parties should contribute. No new cause intervened to occasion the death for whatever was done was done in extremis, in the agony of collision. The settlement with the administratrix was prudent in view of the decedent's youth—he was twenty-seven years old—his life expectancy, rugged frame and robust health, his competency as a worker, his actual earnings and their probable future increase, the relationship of the beneficiaries and the expectation of their long dependency, etc. He left a child scarce three years old. In The Oceanic, 61 Fed. 338, 363, affirmed sub nom. Occidental & O. S. S. v. Smith, 74 Fed. 261 (9th C. C. A.), the sum of $10,000 was awarded for the death of a man thirty-two years of age earning $1,500 to $2,100 a year. In The Volund, 181 Fed. 643, 667 [fol. 269] (2nd C. C. A.) the sum of $12,000 was awarded for the death of a marine engineer earning from $1,300 to $1,500 a year and leaving a wife and child.

The Brooklyn Eastern District Terminal demands as part of its damages the counsel fees and disbursements incurred by it in the death action and the salvage suit. These I find to be reasonable in amount. This claim has support in Hoadley v. Dumois, 11 Misc. 52, 55, affirmed 155 N. Y. 630; Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola, 134 N. Y. 461 and, more doubtfully, in Vogemann v. American Dock & Trust Co., 131 App. Div. 216, affirmed 198 N. Y. 586. Such precedents, however, though found in Federal equity litigation, seem to be lacking in admiralty and the silence of the books is an authority against the allowance of the item. In The Charles G. Lister, 174 Fed. 288, 293, recovery of the taxable costs incorporated in the salvage decree, as well as the salvage award, was allowed against the party whose negligence occasioned the need of salvage. No case in admiralty extending the recovery to the expenses of the salvage litigation has come to my notice. If the claim be deemed so far supported by reason as to warrant an innovation in the admiralty practice, that innovation should receive authority from the Court and should not be introduced by a subordinate tribunal exercising advisory functions.

The survey fee is allowed.

The witnesses produced by Brooklyn Eastern District Terminal on the subject of the amount of damages have

every mark of candor and credibility and their testimony stands uncontradicted.

[fol. 270] The Integrity's repair bills amounted to $23,614.57. The charge for supervision was $2,500 and should be allowed (New Haven Steam-Boat Co. v. The Mayor, etc., 36 Fed. 716, Addison Brown, J., The Cayuga, Fed. Cas. No. 2535, Benedict, J., affirmed Fed. Cas. No. 2537, affirmed 81 U. S. 270). While the Integrity was laid upon, the other Brooklyn Eastern District Terminal tugs had to work longer hours, undergoing excess wear and tear, or to neglect available work. Damages for the detention of the Integrity during repair and refitting are warranted for a period of seventy-eight days at $150 a day as the going market rate, i. e., $11,700 in all. The mode of repair, by days' labor, is authorized by the decisions, e. g., New Haven Steam-Boat Co. v. The Mayor, etc., 36 Fed. 716, is not challenged by any expert testimony and is not to be tested by hind-sight. The burden of proof has been sustained; The Spica, 289 Fed. 436.

The damages of the Brooklyn Eastern District Terminal may therefore be summarized as follows:

| | |
|---|---|
| Repairs | $23,614.57 |
| Supervision | 2,500.00 |
| Demurrage | 11,700.00 |
| Survey fee | 50.00 |
| Settlement of salvage claims | 1,250.00 |
| Settlement of death action | 9,000.00 |

I report the aggregate damages of Brooklyn Eastern District Terminal as $48,114.57 and, the damage to the Raritan having been stipulated as $2,230.00, the difference in the damages of the respective parties is $45,884.57. One-[fol. 271] half of said amount is $22,942.28, which sum Brooklyn Eastern District Terminal is entitled to recover.

I, therefore, report that Brooklyn Eastern District Terminal is entitled, under the terms of the interlocutory decree, to recover by the final decree herein $22,942.28, without interest.

The proofs are filed herewith.

All of which is respectfully submitted.

Dated New York, August 9th, 1930.

George V. A. McCloskey, Special Commissioner.

[fol. 272] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

EXCEPTIONS TO COMMISSIONER'S REPORT

SIRS: Please take notice that the United States of America, respondent and cross-libellant herein hereby excepts to the report of the Special Commissioner filed herein August 9, 1930, upon each of the following grounds:

1. That the allowance by the Special Commissioner to the libellant, Brooklyn Eastern District Terminal for repairs to the tug Integrity and supervision is excessive.

2. That the Special Commissioner allowed to the libellant, Brooklyn Eastern District Terminal the sum of $11,-
[fols. 273 & 274] 700.00 or any part thereof as and for damages for detention of the Tug Integrity due to the collision.

3. That the allowance to the libellant, Brooklyn Eastern District Terminal for settlement of salvage claims is excessive.

4. That the Special Commissioner allowed to the libellant, Brooklyn Eastern District Terminal the sum of $9,-
000.00 or any part thereof as and for its damages sustained by reason of its settlement of the action brought against it for loss of life of Frank Rundell, deceased.

5. That the sum allowed as damages to the libellant, Brooklyn Eastern District Terminal is excessive, without the support of evidence in the record, and contrary to law.

Dated New York, N. Y., August 9, 1930.

Yours, &c., Charles H. Tuttle, United States Attorney, Proctor for United States of America.

Office & P. O. address: 45 Broadway, Borough of Manhattan, City of New York.

[fol. 275] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. #90-165

BROOKLYN EASTERN DISTRICT TERMINAL, Libellant,

against

UNITED STATES OF AMERICA, Respondent

A. #90-329

UNITED STATES OF AMERICA, Cross-Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Cross-Respondent

OPINION BY CAFFEY, J., CONFIRMING REPORT OF SPECIAL COMMISSIONER

Repairs: Indisputably libellant paid out the amounts allowed. Clearly also expense of superintendence was a proper element of damages (New-Haven Steam-Boat Co. v. The Mayor, etc., 36 Fed. 716). Particularly in view of the fact that at the time of the collision libellant was not entitled to sue the United States, there is no ground for attributing or even suspecting a motive to increase damages.

The course pursued and the sums awarded were reasonable. The very fact that the criticism ten years later,—predicated on this branch of the case upon a labor and material instead of a bid basis having been adopted on [fol. 276] the advice of experts,—involves for the respondent only a net of $93.16, seems to me to be adequate refutation of the claim that the allowance by the commissioner was excessive (see Weeks v. The New Orleans, 29 Fed. Cases 583, No. 17,373a; affd. 116 U. S. 13).

Demurrage: The use by libellant of another one or more of its own tugs, as a substitute for the injured tug during the period of repairs, does not prevent allowance of a reasonable sum therefor as an elements of damages (The Favorite v. The Union Ferry Co., 18 Wall. 598, 603). The sole problem is to find what is reasonable.

The principles laid down in The Conquerer, 166 U. S. 110, are adequate to sustain the commissioner. It was there said (p. 127) that "The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered from the market." Libellant used two of its tugs for longer hours daily during a busy season, when it had plenty of work for three tugs. It seems to me there is no better or fairer measure of the extent of the damage than the reasonable value, during the period of detention, of the extra use by libellant of its own tugs for time equivalent to that during which it would have employed the Integrity if uninjured (e. g., Kilpatrick deposition, pp. 18-20) or what would have been the cost to it of hiring a substitute tug (The Cayuga, 5 Fed. Cases 329, 331, No. 2,537; affd. 14 Wall. 270). The evidence amply warranted the conclusion of the commissioner and I see no basis for disturbing it.

In The Conquerer (pp. 133-4) disallowance of demurrage was solely because there was failure to establish [fol. 277] pecuniary loss,—especially in view of the fact that the vessel involved was a yacht, suitable only for pleasure purposes.

It is easy now, with hindsight, to claim that libellant should have accepted the low bid for the repairs; also that if libellant had done so, the detention would have been shorter. In addition to what has been said on this point above, under the heading of repairs, it is enough to quote from the Weeks case, supra (p. 584), where, with respect to the award of cost which exceeded the amount of a rejected offer, Circuit Justice Waite used the following language:

"The offer of Pusey, Jones & Co. to do the work for a less sum than it actually cost is not conclusive evidence that it cost too much. If the libellants show that they acted in good faith, that no more was done than was necessary to put their vessel in as good condition as she was before the collision, and that the prices paid were reasonable, they have made out their case."

Inasmuch as, upon the evidence, application of the extract quoted requires approval of the method by which libellant procured the repairs to be made, it follows neces-

sarily as an incident (reasonably prudent conduct having appeared) that the period during which libellant was deprived of the service of the tug cannot be treated as unduly long.

Salvage Settlement: In his report (p. 3) the commissioner expresses adequate reasons and cites ample authorities for sustaining this item. The proof was suffi- [fol. 278] cient to support the view he took of the facts and I find no occasion to disagree with him.

Death Claim: The negligence which brought about the collision was the primary and proximate cause of the death of the fireman. It does not seem to me that it can be maintained that, in any proper sense, there was an independent intervening cause. It is the merest speculation to assert that the fireman would have suffered no injury if he had remained on the tug and had not, in obedience to the direction of his superior, resorted to the carfloat. The chain of events which ended with his death followed naturally, in the surroundings revealed by the evidence (report, pp. 2-3), as a consequence of the initial wrong for which the interlocutory decree has already held that the respondent is liable in part.

In view of the age, condition and earnings of the deceased, the amount of the settlement was not excessive. It is true that the respondent is not bound by the settlement, but there is ample evidence to justify its having been made and to sustain the reasonableness of the figure at which it was made.

Exceptions overruled and report confirmed.

Dated September 16, 1930.

Francis G. Caffey, U. S. D. J.

[fol. 279] IN UNITED STATES DISTRICT COURT

Present: Hon. Francis G. Caffey, District Judge.

A. #90-165

BROOKLYN EASTERN DISTRICT TERMINAL, as Owner of Steamtug Integrity, Libellant

against

UNITED STATES OF AMERICA, as Owner of U. S. Dredge Raritan, Respondent

A. #90-329

UNITED STATES OF AMERICA, as Owner of U. S. Dredge Raritan, Cross-Libellant

against

BROOKLYN EASTERN DISTRICT TERMINAL, as Owner of Steamtug Integrity, Cross-Respondent

FINAL DECREE—Sept. 26, 1930

The above entitled causes having duly come on to be heard on the pleadings and proofs of the respective parties, [fol. 280] and due deliberation having been had, and the Court having filed its opinion in writing holding the libellant's and cross-respondent's steamtug Integrity and the respondent's and cross-libellant's dredge Raritan both at fault for collision which occurred on September 30th, 1920, and an interlocutory decree having heretofore been entered herein pursuant to the opinion of the Court directing that the Brooklyn Eastern District Terminal, as owner of the steamtug Integrity, recover of and from the United States of America, owner of the dredge Raritan, one-half of the difference between its damages and the damages of the United States of America, as owner of the dredge Raritan, sustained as a result of this collision, and further directing that these causes be referred to George V. A. McCloskey, Esq., as Special Commissioner, to ascertain and compute the amount of the damages of the respective parties, and the Commissioner having duly filed his report herein on August 9th, 1930, reporting the damages of the Brooklyn

Eastern District Terminal in the amount of $48,114.57 and the damages of the United States of America in the amount of $2,230.00, and reporting and recommending that the Brooklyn Eastern District Terminal recover of and from the United States of America, one-half the difference between the damages of the respective parties amounting to $22,942.28 and exceptions having been filed on behalf of the United States of America to the report of the said Commissioner, and said exceptions having been duly brought on to be heard before this Court, and the Court having rendered its opinion in writing wherein and where-[fol. 281] by it was directed that the exceptions of the United States of America be overruled and said report of the Commissioner confirmed in all respects, and the costs of the Brooklyn Eastern District Terminal having been taxed in the total sum of $841.45, and the costs of the United States of America having been taxed in the total sum of $192.10;

Now on motion of Bigham, Englar, Jones & Houston, proctors for the libellant and cross-respondent, Brooklyn Eastern District Terminal, it is

Ordered, adjudged, and decreed that the Brooklyn Eastern District Terminal, as owner of the steamtug Integrity do have and recover of and from the United States of America, owner of the hopper dredge Raritan one-half of the difference between its damages and the damages of the United States of America amounting to the sum of $22,-942.28 plus one-half of the difference between the costs of the Brooklyn Eastern District Terminal and the costs of the United States of America amounting to the sum of $324.68, making the total sum of $23,266.96.

Francis G. Caffey, U. S. D. J.

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[fol. 282] In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the United States of America, respondent and cross-libellant herein, hereby appeals

to the United States Circuit Court of Appeals for the Second Circuit, from a decree of this Court entered herein September 26, 1930, and from each and every part of said decree.

[fol. 283] Dated New York, N. Y., December 23, 1930.

Yours, etc., Robert E. Manley, Acting United States Attorney, Proctor for United States of America.

Office & P. O. address: 45 Broadway, Borough of Manhattan, City of New York.

To Charles Weiser, Esq., Clerk United States District Court, Southern District of New York; Bigham, Englar, Jones & Houston, Esqs., Proctors for Libellant and Cross-Respondent, 64 Wall Street, New York City.

The within appeal is hereby allowed.

Dated New York, N. Y., December 23rd, 1930.

Woolsey, U. S. D. J.

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[fols. 284 & 285] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR

United States of America, respondent and cross-libellant herein, hereby assigns error in the findings, decisions and decrees of the United States District Court for the Southern District of New York, entered herein as follows:

* * * * * * *

[fols. 286-288] 10. In that the Court overruled the respondent's exceptions to the Report of the Special Commissioner.

11. In that the Court allowed the libellant damages for detention of the Integrity during repairs without any proof that the libellant suffered any pecuniary loss by reason of said detention.

Robert E. Manley, Acting United States Attorney, Proctor for United States of America.

Office & P. O. address: 45 Broadway, Borough of Manhattan, City of New York.

[fol. 289] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SETTLING RECORD

It is hereby stipulated and agreed by and between the proctors for the respective parties herein that the foregoing is a true and correct transcript of the record of the District Court as agreed upon by the parties.

Dated New York, N. Y., May 21, 1931.

Bigham, Englar, Jones & Houston, Proctors for Libellant. George Z. Medalie, Proctor for Respondent.

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[fol. 290] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 291] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BROOKLYN EASTERN DISTRICT TERMINAL, Appellee,

against

UNITED STATES OF AMERICA, Appellant

UNITED STATES OF AMERICA, Appellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Appellee

Before Manton, L. Hand, and Chase, Circuit Judges

Appeal from a final decree in the admiralty of the District Court for the Southern District of New York awarding damages for a collision.

Charles E. Wythe for the appellant.
Leonard J. Matteson for the appellee.

OPINION

L. HAND, Circuit Judge:

The only questions raised by this appeal are the amount of damages suffered by the libellant. Its tug, The Integrity, was injured by the collision, and both parties were [fol. 292] held jointly liable. The commissioner to whom the computation of damages was referred made an award

of six items, of which three are here in dispute. These were the "demurrage", which was fixed at $11,700; the settlement of a salvage claim at $1,250; the settlement of a death claim at $9,000. It will be more convenient to state the facts as to each item seriatim.

The libellant was engaged in the towage of car floats in New York Harbor and for this purpose kept three tugs in commission, of which The Integrity was one. Her injuries required her withdrawal and the allowance was for the reasonable hire of a substitute during the time she was in dry dock. The respondent does not object to the amount fixed as reasonable hire for the supposititious substitute, and, though there was some question whether the time during which the tug was kept out of commission was not unreasonably prolonged, in the view we take it is unnecessary to pass upon that question. The libellant did not in fact hire another tug to take The Integrity's place while she was away, but did all its business by working the other two overtime. The theory, which was successful before the commissioner and in the district court, was that since the two were thus used in place of The Integrity, the situation fell within the "spare boat" cases, and that the reasonable hire of a tug of similar capacity was the proper measure; (The Cayuga, 7 Blatch. 385; affirmed 14 Wall. 270; The Favorita, 18 Wall. 598; The Providence, 98 Fed. Rep. 133, (C. C. A. 1); New Haven Steamboat Co. v. N. Y., 36 Fed. Rep. 716; The Mediana, (1900) A. C. 113). However, even "spare" [fol. 293] boats will not serve, if it be not shown that there was work for that which was injured, (Newtown Creek Towing Co. v. N. Y., 23 Fed. (2) 486, (C. C. A. 2); The Priscilla, 25 Fed. (2) 921); and in no event do we think that the doctrine applies when the time lost is made up by boats which are not maintained as "spares". The cases relied upon proceed on the notion that the expense incurred to meet just the situation which arises, is properly attributable to the accident, that being one of the contingencies that occasion the outlay. In the case at bar the other boats were not kept for that purpose; as to them the libellant was at exactly the same charges as it would have been had The Integrity remained in commission, except for any extra expenses of overtime which were not proved. In particular, the argument is that since each tug, as ordinarily operated, was free for part of the twenty-four hours,

the "spare time" was the equivalent of a "spare tug", maintained only for a lay-off. Perhaps this might be sound, if it appeared that three tugs were kept in commission instead of two for that reason; but it does not. So far as the record shows, there was business enough for all, operated for as much of each day as libellant thought reasonable. Certainly we have no ground for saying that it was to constitute a reserve that they were not operated overtime; nothing else will serve. We think that the case falls within The Conqueror, 166 U. S. 110, and The Glendola, 47 Fed. (2) 206, (C. C. A. 2). This item was disallow-.

The collision broke The Integrity adrift from a loaded carfloat in tow, and badly stove her in forward. It may be true that she could have brought her charge to safety, but [fol. 294] her crew did not think so and abandoned the float in the Upper Bay in half a gale of wind with corresponding sea. The cars and their contents were worth about $127,000, and the float might well have collided with ships on the anchorage. The tug, "Agnes", took the vessel in tow and brought it to a safe berth in less than two hours' time, without appreciable risk to herself. For this salvage service the libellant settled with the "Agnes" for $1,250, and charged it in its bill of damages. Considering the amount at risk and the real danger, we will not interfere. A court might well have allowed as much in a salvage suit, and the district judge having passed upon it as such, we see no reason to disturb it.

One of the Integrity's crew, either because he became frightened, or because he got orders from the master to abandon the tug, boarded the float as he saw the respondent's vessel bearing down upon his own. While running along its outboard footpath he was knocked overboard by the force of the collision and drowned. His administratrix recovered nine thousand dollars for his death from the libellant by a voluntary settlement. This is the third item in dispute, whose amount is agreed to have been reasonable. The respondent argues, however, that the death was not a proximate result of the collision and as such not chargeable to it; because the master's order to leave the tug was itself unwarranted, and "broke the causal chain", being an intervening act of negligence. In the first place it is by no means clear that the seaman did not of his own accord think it safer to board the float than to stay on

[fols. 295 & 296] board, or that the order had anything to do with his conduct. That, however, we may pass, because even if he was directed to do so, and if the order was negligent, we have frequently decided that it makes no difference, provided the intervening negligence was within those events reasonably to be anticipated; (The George H. Jones, 27 Fed. (2) 665; Cleary Bros. v. Port Reading R. R. Co., 29 Fed. (2) 495; Hansen v. Dupont Co., 33 Fed. (2) 94; The Glendola, 47 Fed. (2) 206). Here it plainly was. The respondent's vessel was large and came on without change in direction. Perhaps the master lost his head; certainly he abandoned the tug himself, probably in a panic. His order may have been unwise at the time; at least it turned out to be unnecessary, but it was the kind of thing which might happen to any crew and any master. The respondent's liability was not limited to injuries suffered by men of steady nerves; tugs in the harbor are as likely to be manned by timorous, as by fearless, seamen. The item was properly allowed.

Decree modified by disallowing the charge for demurrage and otherwise affirmed without costs.

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[fol. 297] In United States Circuit Court of Appeals, Second Circuit

Brooklyn Eastern District Terminal, Libellant-Appellee,

vs.

United States, Respondent-Appellant

United States, Libellant-Appellant,

vs.

Brooklyn Eastern District Terminal, Respondent-Appellee

Decree filed Jan. 8, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, modified by disallowing the charge for demurrage and otherwise affirmed with interest and without costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

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[fol. 298] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 299] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 23, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 300] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed June 28, 1932

It is hereby stipulated and agreed by andbetween counsel for the respective parties to the above entited case that the following parts of the record, as certified by the United States Circuit Court of Appeals for the Second Circuit and as filed in this Court, are the only parts of the record material to the question before this Court, and that only the following papers need be printed by the Clerk for the hearing of the case:

| Title of Paper | Record |
|---|---|
| Statement of Docket Entries... | Pages 1 to 2, fol. 5. |
| Libel of Brooklyn Eastern District Terminal. | Page 2, fol. 5 to page 10, inclusive. |
| Answer of United States of America. | Page 11 to page 15, inclusive. |
| Cross-Libel of United States.... | Pages 16 to 20, inclusive. |
| Answer to Cross-Libel..... | Pages 21 to 25, inclusive. |
| Opinion of the United States District Court upon the merits. | Pages 98 to 102, inclusive. |
| Interlocutory decree ..... | Pages 103 to 104, inclusive. |
| Testimony before Special Commissioner taken on behalf of Brooklyn Eastern District Terminal. | Pages 105 to 127, inclusive. Page 131, fol. 392, to page 161, inclusive. Page 174, fol. 521 to page 181, fol. 541, inclusive. |
| [fol. 301] Last paragraph on page 185, after words "Libellant Rests", relating to stipulation of damages sustained by U. S. Dredge "Raritan". | Page 185, last paragraph of fol. 554. |

That in place of libellant's Exhibit No. 1, pages 186 to 190 inclusive, the following statement shall be printed:

"NOTE.—Libellant's Exhibit No. 1 consisting of the report of marine surveyors, who examined the steamtug 'Integrity', dated Jersey City, New Jersey, October 2nd, 1920, itemizing the damage sustained by the steam tug 'Integrity' due to collision with the United States dredge 'Raritan' has been omitted by stipulation of counsel."

That in place of Libellant's Exhibit No. 2, page 191, the following statement shall be printed:

"NOTE.—Libellant's Exhibit No. 2, consisting of supplemental report of the marine surveyors, who examined the steamtug 'Integrity', dated October 26th, 1920 amending their original report with respect to one item of damage, has been omitted by stipulation of counsel."

That in place of Libellant's Exhibit No. 3, pages 192 to 223, inclusive, the following statement shall be printed:

"NOTE.—Libellant's Exhibit No. 3 consists of the repair bill presented by Vulcan Iron Works, Inc. to the Brooklyn Eastern District Terminal, dated December 15th, 1920, showing the work done on each day between the dates of October 1st, 1920 and December 15th, 1920 to repair the collision damage to the steamtug 'Integrity', and a supplemental bill dated January 28th, 1921, for certain work done on No-
[fol. 302] vember 15th, 1920, and omitted from the original bill. The amount of the bill dated December 15th, 1920 is $23,526.32 and the amount of the supplemental bill dated January 28th, 1921 is $88.25. Both bills bear the notation: 'Seen and noted Mar. 18/21, Wm. R. Bagger' and the notation: 'Checked and Passed, Alley Eels & Co., by Ralph J. Frank, Feby. 14, 1921'" These bills are omitted from this record by stipulation of counsel.

| Title of paper | Record. |
|---|---|
| Report of Special Commissioner | Pages 266 to 271, inclusive. |
| Exceptions to Commissioner's Report. | Pages 272 to 273, inclusive. |
| Opinion of United States District Court confirming the report of Special Commissioner. | Pages 275 to 278, inclusive. |
| Final Decree | Pages 279 to 281, inclusive. |
| Notice of Appeal | Pages 282 to 283, inclusive. |
| Assignments of Error (omitting assignments #1 to #9, inclusive, #12 and #13). | Pages 284 to 286, inclusive (omitting assignments of error #1, 2, 3, 4, 5, 6, 7, 8, 9, 12 and 13). |
| Stipulation Settling Record | Page 289. |
| District Court Clerk's Certificate | Page 290. |
| Opinion of United States Circuit Court of Appeals for the Second Circuit. | Pages 291 to 294. |

| Title of paper | Record. |
|---|---|
| Order for Mandate of United States Circuit Court of Appeals, Second Circuit. | Pages 294 to 295. |
| Certificate of Clerk of Circuit Court of Appeals. | Page 295. |

[fols. 303 & 304]

Order for Writ of Certiorari and other necessary papers in the Supreme Court of the United States.

Dated New York, June 9th, 1932.

Oscar R. Houston, Leonard J. Matteson, Counsel for Appellant, Brooklyn Eastern District Terminal. Thomas S. Thacher, Solicitor General, Counsel for Respondent, United States of America.

[fol. 305] [File endorsement omitted.]

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Endorsed on cover: File No. 36,691. U. S. Circuit Court of Appeals, Second Circuit. Term No. 39. Brooklyn Eastern District Terminal, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed April 15, 1932. File No. 36,691.

FILE COPY

APR

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. 377 39

BROOKLYN EASTERN DISTRICT TERMINAL,
*Petitioner,*

—against—

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
*Counsel for Petitioner.*

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Did the Circuit Court of Appeals, reversing the District Court and the Commissioner, properly disallow libellant's claim for loss of use of the tug "Integrity" during the period of repairs on the ground that her services were replaced by the services of two other tugs owned by the libellant working extra hours overtime and not by an "outside" tug hired for the purpose? ..... 2

REASONS FOR ALLOWANCE OF WRIT—

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court.

2. The decision of the Circuit Court of Appeals is in conflict with the decisions of the Circuit Courts of Appeal in the First, Third and Ninth Circuits.

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SPECIFICATION OF ERROR—

In that the Circuit Court of Appeals reversed the decisions of the District Court and the Special Commissioner and disallowed libellant's claim for damages for loss of use of the tug "~~Raritan~~ Integrity" during the period of repairs, although the libellant was obliged to replace the services of the "Integrity" and furnished as a substitute the services of two of its other tugboats operated extra hours overtime, the equivalent of the services of a spare tugboat, on the ground that the libellant had not shown that it had specifically declared its policy of keeping three tugboats in commission instead of two for the purpose of maintaining spare tugboat capacity for emergencies..... 9

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# Supreme Court of the United States

OCTOBER TERM, 1931.

No. .

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BROOKLYN EASTERN DISTRICT TERMINAL,
*Petitioner,*

—against—

UNITED STATES OF AMERICA,
*Respondent.*

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## The Petition of Brooklyn Eastern District Terminal For a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.*

### Statement.

The opinion of the Circuit Court of Appeals was filed January 11, 1932, and appears in this record at pages 291 to 294. It is reported at 54 F. (2d) 978. The order for mandate was filed January 18, 1932 (R. 294). The opinion of the District Court was filed September 16, 1930 (R. 275-8), and is not officially reported, but is reported in full 1931 A. M. C. 345-47. The report of the Special Commissioner appointed to assess damages was filed August 9th, 1930 (R. 266-271) and is

not officially reported, but is reported in part 1931 A. M. C. 342-44.

This petition is brought to review that part of the decision of the Circuit Court of Appeals reversing the decisions of the District Court and of the Commissioner appointed to assess damages, allowing the libellant's claim for damages for loss of use of the steamtug "Integrity" during the period of repairs required as a result of collision with the United States Dredge "Raritan" in New York Harbor, September 30, 1920. This action was instituted by the libellant as the owner of the tug "Integrity" under Private Law 163, approved February 16, 1925, authorizing suit against the United States. A cross-libel was filed by the United States for damage to the dredge "Raritan". The District Court after a trial on the merits held that the collision resulted from the fault of both vessels and awarded the libellant a recovery of half its damages less half the damages sustained by the dredge "Raritan". A single question is presented to be reviewed by this Court.

## The Question Presented.

*Did the Circuit Court of Appeals, reversing the District Court and the Commissioner, properly disallow libellant's claim for loss of use of the tug "Integrity" during the period of repairs on the ground that her services were replaced by the services of two other tugs owned by the libellant working extra hours overtime and not by an "outside" tug hired for the purpose?*

The facts are that the libellant had three tugs which were ordinarily employed ten hours per day each. The libellant's business was such that it had regular and continuous employment for all three tugs for the full

period each day. While the tug "Integrity" was laid up for repairs consequent on the collision in this case, the work which it ordinarily performed was performed by the other two tugs operating the necessary number of extra hours overtime each day. The libellant, therefore, furnished as a substitute for the "Integrity" the equivalent of the services of another tugboat operating ten hours a day out of its spare tugboat capacity. There is no question about these facts. They were found by the District Court and the Commissioner, and these findings have not been disturbed by the Circuit Court of Appeals.

On these facts the Commissioner allowed libellant compensation for the loss of use of the tug "Integrity" at "the going market rate" (R. 270). The District Court confirmed this award as "the reasonable value during the period of detention, of the extra use by the libellant of its own tugs for time equivalent to that during which it would have employed the 'Integrity' if uninjured (*e. g.*, Kilpatrick Deposition, pp. 18-20), or what would have been the cost to it of hiring a substitute tug (*The Cayuga*, 5 Fed. Cases 329, 331, No. 2537; aff'd. 14 Wall. 270)" (R. 276).

On the appeal the United States did not object to the amount fixed as the reasonable hire of a substitute but only to the allowance of any damages whatever to the libellant on this count (R. 291, 286). The Circuit Court of Appeals disallowed the claim for loss of use in its entirety.

The libellant's contention is that it furnished as a substitute for the "Integrity" the equivalent of a spare tugboat maintained for such an emergency. Libellant's requirements for tugboat service were ordinarily met by the services of three tugboats working daily shifts of ten

hours each. This service could as well have been performed by two tugboats working two shifts per day apiece. If the libellant had arranged its business in this manner and had maintained the third tugboat as a "spare" and had used the third tugboat as a substitute in the emergency brought about by this collision there is no doubt under the decisions of this Court and of the lower courts that it would have been entitled to recover the reasonable hire of a tugboat of similar capacity as the proper measure of damages for loss of use of the vessel injured——

> *The Cayuga*, 7 Blatch. 385, affd. 14 Wall. 270;
> *The Favorita*, 18 Wall. 598, 603;
> *The Providence*, 98 Fed. 133 (C. C. A. 1);
> *New Haven Steamboat Co.* v. *New York*, 36 Fed. 716 (S. D. N. Y.);
> *The Emma Kate Ross*, 50 Fed. 845 (C. C. A. 3).

The Circuit Court of Appeals, admitting this, nevertheless refused to allow the libellant damages for loss of use on the ground that it did not appear definitely in the record that the libellant had specifically arranged its business as it did "for that reason", that is for the purpose of maintaining sufficient spare tugboat capacity to serve in an emergency. The Circuit Court of Appeals said:

> "In particular, the argument is that since each tug, as ordinarily operated, was free for part of the 24 hours, the spare time was the equivalent of a 'spare tug', maintained only for a lay-off. *Perhaps this might be sound, if it appeared that three tugs were kept in commission instead of two for that reason; but it does not.* So far as the

record shows, there was business enough for all operated for as much of each day as libellant thought reasonable. *Certainly we have no ground for saying that it was to constitute a reserve that they were not operated overtime; nothing else will serve*" (R. 292). (Italics ours.)

We submit that the fact that the libellant did not hold a directors' meeting and specifically adopt a resolution declaring its reasons for arranging its operating schedule as it did is not a sufficient basis for denying to the libellant damages for loss of use of the tug "~~Rari-tan~~ Integrity" under the circumstances of this case and the decision is in conflict with the authorities hereinafter cited.

## Reasons for Allowance of Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the following decisions of this Court:

*The Cayuga*, 7 Blatch. 385, aff'd. 14 Wall. 270;
*The Favorita*, 18 Wall. 598;
*The Potomac*, 105 U. S. 630;
*The Conqueror*, 166 U. S. 110.

2. The decision of the Circuit Court of Appeals is in conflict with the following decisions of the Circuit Courts of Appeal in other circuits:

FIRST CIRCUIT.

*The Providence*, 98 Fed. 133;
*The Priscilla*, 55 Fed. (2d) 32.*

* We understand a petition for certiorari will be filed in this case substantially simultaneously herewith on the ground of the inconsistency of the decision with the decisions in the Second Circuit.

THIRD CIRCUIT.

*The Emma Kate Ross*, 50 Fed. 845.

NINTH CIRCUIT.

*State of California*, 54 Fed. 404.

3. The decision of the Circuit Court of Appeals for the Second Circuit is exceedingly unfair and unjust to operators of steam vessels and is but one in a series of decisions showing such an illiberal attitude to shipowners with respect to the recovery of damages for loss of use in collision cases as to be seriously prejudicial to the owners of ships in general to such an extent that the question has become one of great public interest which should be reviewed by this Court with view to bringing the law in the Second Circuit more nearly into conformity with the law in other circuits and in other countries engaged in the shipping business, notably Great Britain.

See the following cases:

*Newtown Creek Towing Company* v. *City of New York*, 23 F. (2d) 486 (C. C. A. 2);
*The Glendola*, 47 F. (2d) 206 (C. C. A. 2);
*United States of America* v. *S. S. Celtic* (C. C. A. 2), decided March 14, 1932, as yet unreported;
*The Mediana* (1900), Appeal Cases 113 House of Lords).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States

Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 72", October Term, 1931, "*Brooklyn Eastern District Terminal, Libellant-Appellee*, against *United States of America, Respondent-Appellant*", and "*United States of America, Cross-Libellant-Appellant*, against *Brooklyn Eastern District Terminal, Cross-Respondent-Appellee*", and that the said decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, in so far as the same disallows the Brooklyn Eastern District Terminal damages for loss of use of its steamtug "Integrity" while undergoing repairs, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

BROOKLYN EASTERN DISTRICT TERMINAL

By LEONARD J. MATTESON,
Counsel for Petitioner.

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## Certificate of Counsel.

We hereby certify that the foregoing petition in our opinion is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

Dated, April 14, 1932.

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
Counsel for Petitioner.

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. .

BROOKLYN EASTERN DISTRICT TERMINAL,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## *BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.*

### *Jurisdiction.*

The facts are fully stated in the petition. This is a suit within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Article 3, Section 2 of the Constitution of the United States of America and under Section 240 of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938 (Title 28, Chapter 9, Section 347, U. S. Code).

### *Specification of Error.*

The United States Circuit Court of Appeals for the Second Circuit erred in the following respect:

*In that the Circuit Court of Appeals reversed the decisions of the District Court and the Special Commis-*

*sioner and disallowed libellant's claim for damages for loss of use of the tug "~~Raritan~~ Integrity" during the period of repairs, although the libellant was obliged to replace the services of the "Integrity" and furnished as a substitute the services of two of its other tugboats operated extra hours overtime, the equivalent of the services of a spare tugboat, on the ground that the libellant had not shown that it had specifically declared its policy of keeping three tugboats in commission instead of two for the purpose of maintaining spare tugboat capacity for emergencies.*

## *Argument.*

Even the Circuit Court of Appeals virtually concedes that the libellant would be entitled to damages for loss of use of the tug "Integrity" under the doctrine of the spare boat cases if it had been shown that it had definitely formulated and declared in advance its policy of operating its three vessels ten hours per day for the purpose of having spare boat capacity available in the event of an emergency (R. 292). The Circuit Court of Appeals itself was the first to suggest the necessity for any such showing. We submit that this is not a sufficient basis for distinguishing this case from the decisions of this Court and the Circuit Courts of Appeal in other circuits which have been cited, and that no such distinction is warranted by the principles laid down in those decisions. It would be strange indeed if the mere fact that the libellant had failed to definitely formulate and declare a policy of maintaining three tugboats in operation, instead of two tugboats and a spare, for the purpose of maintaining spare tugboat capacity in case of an accident disabling one of the tugs, should be allowed to make the difference

between the libellant's recovering damages for loss of use from the tort feasor and recovering nothing.

No difference in principle can be noted between the cases where the libellant maintains two tugboats and a spare, or three tugboats working lesser hours. The libellant's investment, overhead and depreciation are identical in either case. It is a mere matter of convenience which plan is adopted. The case is therefore squarely in conflict with the "spare boat" decisions by this Court and in other circuits.

The leading case is *The Cayuga*, 7 Blatch. 385 (C. C. N. Y.), Fed. Cas. No. 2537, affirmed by this Court with specific approval of the opinion, 81 U. S. (14 Wall.) 270. In that case a ferryboat was damaged and replaced by another ferryboat owned by the libellant and kept available for use when an accident or other cause should disable one of the boats in daily use. It was contended there, as here, that the libellant had suffered no loss and was not entitled to any recovery. The libellant, however, by experts, proved the reasonable value of the use of the damaged vessel and a recovery was allowed to the libellant on this basis. In his opinion Circuit Justice Woodruff said:

> "If it be conceded that a just allowance for the necessary cost of another boat, hired at its fair value to perform the service, would be necessary to the indemnity of the libellants, there is no sound reason, I think for withholding such allowance when the libellants furnish the substituted boat themselves. * * * In the case of the *Rhode Island* (Case No. 11,744) an allowance of a sum which would have enabled the libellant to supply the place of an injured vessel, was affirmed by Mr. Justice Nelson although, in fact, the place of the

> injured vessel was not supplied at all. The principle of indemnity is uniformly recognized as just, and its measure must be the same, whether a substitute is furnished by the libellant or procured from another. * * * To withhold compensation is, to my mind, obvious injustice. Where the proof of what such a boat could have been let for upon hire or charter is practicable, as in the cases relied upon by the claimants, that is a just measure. The whole subject has been much debated, and no rule which is adapted to every supposable case can be deemed established. It is not true that the use of this boat has, in fact or in law, no value. The testimony of witnesses conversant with the subject, and of long experience, proves the contrary."

This opinion received the full approval of this Court, 81 U. S. (14 Wall.) 270, 278.

*The Favorita*, 8 Blatch. 539, Fed. Cas. No. 4695, affirmed 85 U. S. (18 Wall.) 598, 603-604, was based on similar facts and followed the decisions in *The Cayuga*.

The doctrine of these cases has nowhere been better stated than by Judge Brown in the case of *The New Haven Steamboat Co.* v. *The Mayor, etc.*, 36 Fed. 716, 718 (S. D. N. Y.):

> "The owners were entitled to procure another boat to take the place of the 'Continental', while she was disabled through the collision. It is immaterial to the respondents whether the substitute was hired from other persons at market rates, or supplied by the libellants themselves. If the latter chose, as a matter of policy, to be at the expense of maintaining a 'spare boat' for emergencies, the

> liability to accidents like the present was one of the causes and inducements to this outlay, as the evidence of the superintendent shows. They are entitled, therefore, to charge for the use of their own boat at the market value of its use, for the time being, precisely as if they had hired her from other owners."

This case involved damage to an excursion boat, which was replaced by a "sister boat" kept by the libellants——

> "for the purpose, *in part*, as appears from the evidence, of continuing the trips of the line with regularity, in case of accident to one of the regular boats, or during their repair. She was also occasionally let out for excursions, and upon special charters" (p. 717). (Italics ours).

Note that the sister boat was maintained only "in part" as a spare and was partially employed at other times on special charters,—just as the two sister boats of the "Integrity" were employed at less than their full capacity.

The Circuit Court of Appeals for the Third Circuit adopted and applied the spare boat doctrine in the case of *The Emma Kate Ross,* 50 Fed. 845. In this case an excursion vessel was damaged and her use lost for a period during which she was replaced part of the time by a vessel hired by her owners and for the balance of the period by the substitution of another vessel of the same owners. The Court allowed the libellant the cost of substitution which it measured by the cost of hiring an outside vessel for the entire period. In deciding the case the Court said:

> "Notwithstanding the decision, the respondents

here, again present the question, contending for the same reason, that the libellants should receive nothing for the 12 days during which their own vessel was substituted. Whatever we might think of this question if it was open, we are bound by the decision. It is not, however, improper to say that we think the decision is right. The libellants were entitled to the market value of the services rendered by their substitutes,—regardless of the fact that they might otherwise have been idle. The vessels represented a large investment made in preparation for contingencies which might require their services. Why then should the respondents have their use without paying for it? As the court said in *The Cayuga*, 7 Blatch. 390:

> 'There is neither justice nor equity in allowing a tort feasor the benefit of this outlay, gratuitously. Conceding that a just allowance for the necessary cost of another vessel, hired at a fair value, to perform the services is necessary to indemnify the libellants, there is no ground for withholding such allowance when the libellants themselves furnish the substitute'" (pp. 847, 848).

The Circuit Court of Appeals for the First Circuit adopted and applied the doctrine of *The Emma Kate Ross* in the case of *The Priscilla*, 55 Fed. (2d) 32. In that case the Court allowed the libellant the market value of the use of one of its barges ordinarily in service in the port of New York, which was towed to Boston and there used to replace the damaged vessel owned by the same owners. The Court, after quoting at length from

the opinion of the Circuit Court of Appeals for the Third Circuit, said:——

> "The reasoning advanced in the opinion in 'The Emma Kate Ross' is in accordance with the opinions of the Supreme Court and governs our decision in this case (*The Conqueror*, 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937, and cases there cited), and we think that the libelant, by its evidence, made out a *prima facie* case as to this element of damage and rendered it incumbent on the libelees to go forward with proof and show that barge 'No. 25', during the period of substitution, would, in fact, have been an idle boat. This they failed to do. See *The State of California* (C. C. A.), 54 F. 404."

The Circuit Court of Appeals for the First Circuit had previously adopted the doctrine of *The Cayuga* in the case of *The Providence*, 98 Fed. 133.

The Circuit Court of Appeals for the Ninth Circuit has applied the same rule in *The State of California*, 54 Fed. 404. The Court there awarded the libellant "a fair estimate of the value of her use during the time of her detention" (p. 407), although a sister ship had been substituted, and said:

> "The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency.

> Upon consideration of the evidence, we are satisfied that the amount allowed for demurrage is reasonable."

The English courts have adopted the same rule—*The Mediana*, 1900 Appeal Cases 113 (House of Lords).

The decision of the Circuit Court of Appeals is apparently based on the theory that the substituted vessels would have been idle during the period of substitution and that for this reason compensation for their use at market rates must be denied. The theory is that, under these circumstances, the loss suffered is limited to the extra expense of operating the substituted vessel. This is the theory of the Circuit Court's earlier decisions in *Newtown Creek Towing Co.* v. *City of New York*, 23 F. (2d) 486 and *The Glendola*, 47 F. (2d) 206, cited in the opinion (R. 292). To deny compensation at market rates on this basis is directly in conflict with the doctrine of the spare boat cases, which we have cited, which proceed on the assumption that the substituted vessel would have been idle.

Moreover, this theory of the Circuit Court of Appeals is unsound in principal. If the owner of vessels A and B can recover market rates for the use of A when substituted for B, only if A would have been employed at market rates in any event, it is evident that the owner in such case is still uncompensated for the loss of use of one of his vessels as he would have received market rates for the use of vessel A if there had been no collision. He would then be receiving from the tort feasor for the use of vessel A only what he would otherwise have received from some one else and he is still uncompensated for the loss of use of B (or the loss of the business A would otherwise have done).

To view the matter from another angle, suppose several vessel owners have vessels which are not in use and are available as substitutes, but the owner of the injured vessel has none. Undoubtedly the injury to vessel B makes employment available for some vessel which otherwise would have had none. Any one of the other vessel owners can of course supply his vessel as a substitute and receive the market rate. To deny the same privilege to the owner of vessel B when he owns another vessel of the same type is to discriminate against him as an owner of vessels of the class in question and to penalize him for having two vessels. He alone of the entire class of owners of vessels of the given type is not permitted to obtain for his vessel the employment at market rates made available by the tort from which he has suffered. We submit such a result is not justice and is not in accordance with the equitable principles by which the admiralty courts are guided.

The damages allowed to the libellant by the District Court were the market value of the use of the "Integrity" during the time of detention, that is, what the libellant would have had to pay if it had hired a similar vessel (R. 117, 270, 276). This rate has not been contested (R. 291, 286). This is the measure of damage established by the rule of this court. In the case of *The Potomac*, 105 U. S. 630, 631, this court said:

> "In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for the loss of her use, while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered."

And in *The Conqueror*, 166 U. S. 110, 127, this court said:

> "The best evidence of damages suffered by detention is the sum for which vessels of the same size and class can be chartered in the market."

## *Conclusion.*

The Circuit Court of Appeals erred in disallowing libellant's claim for loss of use of the steamtug "Integrity" during the period of repairs and in failing to allow the libellant as damages the reasonable market value of the loss of use of the tug "Integrity" during the period of repairs or the market value of the services of the vessels substituted. The decision is in conflict with the decisions of this Court and of other Circuit Courts of Appeal as well as those of the courts of Great Britian and is wrong in principle. The attempted distinction is insubstantial and not warranted by the principles laid down in the decisions in the spare boat cases. The decisions of the Circuit Court of Appeals for the Second Circuit in this and other cases are so at variance with the law in other circuits and in Great Britian on a matter of great importance to shipowners in general as to raise a question of considerable public interest. We submit that the decision of the Circuit Court of Appeals in this case should be reviewed by this court and reversed.

Respectfully submitted,

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
*Counsel for Petitioner.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

No. 39.

BROOKLYN EASTERN DISTRICT TERMINAL,

*Petitioner,*

—against—

THE UNITED STATES OF AMERICA,

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

## BRIEF FOR PETITIONER.

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
*Counsel for Petitioner.*

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IN THE

# Supreme Court of the United States

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BROOKLYN EASTERN DISTRICT TERMINAL,

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On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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## *BRIEF FOR PETITIONER.*

### *Opinions Below.*

The opinion of the Circuit Court of Appeals appears in the record at page 78 and is reported 54 F. (2d) 978. The opinion of the District Court appears in the record at page 72 and is not officially reported, but is reported in full, 1931 A. M. C. 345-47. The report of the Special Commissioner appointed to assess damages appears in the record at page 67 and is not officially reported, but is reported in part, 1931 A. M. C. 342-44.

### *Jurisdiction of This Court.*

A petition for a writ of certiorari was filed April 15, 1932 (R. 85) and was granted by order of this Court entered May 23, 1932 (R. 82).

The jurisdiction of this Court is under Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347), and under Article 3, Section 2, Clause 1, Constitution of the United States.

## *Statement.*

By this writ the petitioner seeks to review the decree of the United States Circuit Court of Appeals for the Second Circuit made January 18, 1932 (R. 81-2), modifying the decree of the United States District Court for the Southern District of New York, in admiralty entered September 26, 1930 (R. 75-6), on the opinion of the Honorable Francis G. Caffey, District Judge (R. 72-4), approving the findings of the Special Commissioner, George V. A. McCloskey, Esq., appointed by the District Court to assess damages (R. 67-70).

In particular, petitioner seeks to review that part of the decision of the Circuit Court of Appeals reversing the decisions of the District Court and of the Commissioner appointed to assess damages, allowing the libellant's claim for damages for loss of use of the steamtug "Integrity" during the period of repairs required as a result of collision with the United States Dredge "Raritan" in New York Harbor, September 30, 1920.

This action was instituted by the libellant as the owner of the tug "Integrity" under Private Law 163, approved February 16, 1925, authorizing suit against the United States. A cross-libel was filed by the United States for damage to the dredge "Raritan". The District Court after a trial on the merits held that the collision resulted from the fault of both vessels and awarded the libellant a recovery of half its damages less half the damages sustained by the dredge "Raritan".

## *Question Presented.*

A single question is presented to be reviewed by this Court.

*Did the Circuit Court of Appeals, reversing the District Court and the Special Commissioner, properly disallow libellant's claim for loss of use of the tug "Integrity" during the period of repairs on the ground that her services were replaced by the services of two other tugs owned by the libellant working extra hours overtime and not by an "outside" tug hired for the purpose?*

## *Facts.*

This libel was filed and the opinion of the District Court was rendered before Admiralty Rule 46½ (281 U. S. 773) became effective. However, although the opinions of the lower courts are not in the form of specific findings of fact, the facts are not in dispute.

The facts are that the libellant had three tugs which were ordinarily employed ten hours per day each. The libellant's business was such that it had regular and continuous employment for all three tugs for the full period each day. While the tug "Integrity" was laid up for repairs consequent on the collision in this case, the work which it ordinarily performed was performed by the other two tugs operating the necessary number of extra hours overtime each day (Kilpatrick, R. 27-30). The libellant, therefore, furnished as a substitute for the "Integrity" the equivalent of the services of another tugboat operating ten hours a day out of its spare tugboat capacity. There is no question about these facts. They were found by the District Court (R. 73) and the Special Commissioner (R. 70) and these findings have not been disturbed by the Circuit Court of Appeals.

On these facts the Commissioner allowed libellant compensation for the loss of use of the tug "Integrity" at "the going market rate" (R. 70). The District Court confirmed this award as "the reasonable value during the period of detention, of the extra use by the libellant of its own tugs for time equivalent to that during which it would have employed the 'Integrity' if uninjured, or what would have been the cost to it of hiring a substitute tug (*The Cayuga*, 5 Fed. Cases 329, 331, No. 2537; aff'd 14 Wall 270)" (R. 73).

On the appeal the United States did not object to the amount fixed either as the reasonable value of the hire of a substitute, or of the services of the "Integrity" which were lost, but contested the allowance of any damages whatever to the libellant for loss of use (R. 79, 77). The Circuit Court of Appeals disallowed the claim for loss of use in its entirety (R. 80).

The libellant's contention is that it furnished as a substitute for the "Integrity" the equivalent of a spare tugboat maintained for such an emergency. Libellant's requirements for tugboat services were ordinarily met by the services of three tugboats working daily shifts of ten hours each. This service could as well have been performed by two tugboats working the required extra shifts each day. If the libellant had arranged its business in this manner and had maintained the third tugboat as a "spare" and had used the third tugboat as a substitute in the emergency brought about by this collision there is no doubt under the decisions of this Court and of the lower courts that it would have been entitled to recover the reasonable hire of a tugboat of similar capacity as the proper measure of damages for loss of use of the vessel injured.

*The Cayuga*, 7 Blatch. 385, affd. 14 Wall. 270;
*The Favorita*, 18 Wall. 598, 603;

*The Providence,* 98 Fed. 133 (C. C. A. 1);
*New Haven Steamboat Co.* v. *New York,* 36 Fed. 716 (S. D. N. Y.);
*The Emma Kate Ross,* 50 Fed. 845 (C. C. A. 3).

The Circuit Court of Appeals, admitting this, nevertheless refused to allow the libellant damages for loss of use on the ground that it did not appear definitely in the record that the libellant had specifically arranged its business as it did "for that reason", that is for the purpose of maintaining sufficient spare tugboat capacity to serve in an emergency. The Circuit Court of Appeals said:

> "In particular, the argument is that since each tug, as ordinarily operated, was free for part of the 24 hours, the spare time was the equivalent of a 'spare tug', maintained only for a lay-off. *Perhaps this might be sound, if it appeared that three tugs were kept in commission instead of two for that reason; but it does not.* So far as the record shows, there was business enough for all operated for as much of each day as libellant thought reasonable. *Certainly we have no ground for saying that it was to constitute a reserve that they were not operated overtime; nothing else will serve*" (R. 79-80). (Italics ours.)

We submit that the fact that the libellant did not hold a directors' meeting and adopt a resolution specifically declaring its reasons for arranging its operating schedule as it did is not a sufficient basis for denying to the libellant damages for loss of use of the tug "Integrity" under the circumstances of this case and that the decision is wrong and in conflict with the authorities hereinafter cited.

## POINT I.

**The Circuit Court of Appeals erred in reversing the decisions of the District Court and the Special Commissioner and disallowing libellant's claim for damages for loss of use of the tug "Integrity" during the period of repairs, although the libellant was obliged to replace the services of the "Integrity" and furnished as a substitute the services of two of its other tugboats operated extra hours overtime, the equivalent of the services of a spare tugboat, on the ground that the libellant had not shown that it had specifically declared its policy of keeping three tugboats in commission instead of two for the purpose of maintaining spare tugboat capacity for emergencies.**

Even the Circuit Court of Appeals virtually concedes that the libellant would be entitled to damages for loss of use of the tug "Integrity" under the doctrine of the spare boat cases if it had been shown that it had definitely formulated and declared in advance its policy of operating its three vessels ten hours per day for the purpose of having spare boat capacity available in the event of an emergency (R. 80). The Circuit Court of Appeals itself was the first to suggest the necessity for any such showing. We submit that this is not a sufficient basis for distinguishing this case from the decisions of this Court and the Circuit Courts of Appeal in other circuits which have been cited, and that no such distinction is warranted by the principles laid down in those decisions. It would be strange indeed if the mere fact that the libellant had failed to formulate definitely and declare a policy of maintaining three tugboats in operation, instead of two tugboats and a spare, for the purpose of maintaining spare tugboat capacity in case of an accident disabling one of the tugs, should be allowed to make

the difference between the libellant's recovering damages for loss of use from the tort feasor and recovering nothing.

No difference in principle can be noted whether the libellant maintained two tugboats and a spare, or three tugboats working lesser hours. The libellant's investment, overhead and depreciation would be identical in either case. The suggestion that the libellant had no expense of this character in this case is without merit. It was merely a matter of convenience which plan of operation was adopted. The case is therefore squarely in conflict with the "spare boat" decisions by this Court and in other circuits as well as the earlier decisions in the Second Circuit.

The leading case is *The Cayuga*, 7 Blatch. 385 (C. C. N. Y.), Fed. Cas. No. 2537, affirmed by this Court with specific approval of the opinion, 81 U. S. (14 Wall.) 270. In that case a ferryboat was damaged and replaced by another ferryboat owned by the libellant and kept available for use when an accident or other cause should disable one of the boats in daily use. It was contended there, as here, that the libellant had suffered no loss and was not entitled to any recovery. The libellant, however, by experts, proved the reasonable value of the use of the damaged vessel and a recovery was allowed to the libellant on this basis. In his opinion Circuit Justice Woodruff said:

> "If it be conceded that a just allowance for the necessary cost of another boat, hired at its fair value to perform the service, would be necessary to the indemnity of the libellants, there is no sound reason, I think for withholding such allowance when the libellants furnish the substituted boat themselves. * * * In the case of the *Rhode Island* (Case No. 11,744) an allowance of a sum which would have enabled the libellant to supply the place of an injured vessel, was affirmed by Mr. Justice Nelson although, in fact, the place of the injured vessel was

not supplied at all. The principle of indemnity is uniformly recognized as just, and its measure must be the same, whether a substitute is furnished by the libellant or procured from another. * * * To withhold compensation is, to my mind, obvious injustice. Where the proof of what such a boat could have been let for upon hire or charter is practicable, as in the cases relied upon by the claimants, that is a just measure. The whole subject has been much debated, and no rule which is adapted to every supposable case can be deemed established. It is not true that the use of this boat has, in fact or in law, no value. The testimony of witnesses conversant with the subject, and of long experience, proves the contrary."

This opinion received the full approval of this Court, 81 U. S. (14 Wall.) 270, 278.

*The Favorita*, 8 Blatch. 539, Fed. Cas. No. 4695, affirmed 85 U. S. (18 Wall.) 598, 603-604, was based on similar facts and followed the decisions in *The Cayuga*.

The doctrine of these cases has nowhere been better stated than by Judge Brown in the case of *The New Haven Steamboat Co.* v. *The Mayor, etc.*, 36 Fed. 716, 718 (S. D. N. Y.):

"The owners were entitled to procure another boat to take the place of the 'Continental', while she was disabled through the collision. It is immaterial to the respondents whether the substitute was hired from other persons at market rates, or supplied by the libellants themselves. If the latter chose, as a matter of policy, to be at the expense of maintaining a 'spare boat' for emergencies, the liability to accidents like the present was one of the causes and inducements to this outlay, as the evidence of the superintendent shows. They are entitled, therefore, to charge for the use of their own boat at the market

> value of its use, for the time being, precisely as if they had hired her from other owners."

This case involved damage to an excursion boat, which was replaced by a "sister boat" kept by the libellants——

> "for the purpose, *in part*, as appears from the evidence, of continuing the trips of the line with regularity, in case of accident to one of the regular boats, or during their repair. She was also occasionally let out for excursions, and upon special charters" (p. 717). (Italics ours.)

Note that the sister boat was maintained only "in part" as a spare and was partially employed at other times on special charters,—just as the two sister boats of the "Integrity" were employed at less than their full capacity.

The Circuit Court of Appeals for the Third Circuit adopted and applied the spare boat doctrine in the case of *The Emma Kate Ross*, 50 Fed. 845. In that case an excursion vessel was damaged and her use lost for a period during which she was replaced part of the time by a vessel hired by her owners and for the balance of the period by the substitution of another vessel of the same owners. The Court allowed the libellant the value of the substitute which it measured by the cost of hiring an outside vessel for the entire period. In deciding the case the Court cited *The Cayuga* and *The Favorita* and said:

> "Notwithstanding the decision, the respondents here, again present the question, contending for the same reason, that the libellants should receive nothing for the 12 days during which their own vessel was substituted. Whatever we might think of this question if it was open, we are bound by the decision. It is not, however, improper to say that we think the decision is right. The libellants were entitled to the market value of the services rendered by their sub-

stitutes,—regardless of the fact that they might otherwise have been idle. The vessels represented a large investment made in preparation for contingencies which might require their services. Why then should the respondents have their use without paying for it? As the court said in *The Cayuga,* 7 Blatch. 390:

> 'There is neither justice nor equity in allowing a tort feasor the benefit of this outlay, gratuitously. Conceding that a just allowance for the necessary cost of another vessel, hired at a fair value, to perform the services is necessary to indemnify the libellants, there is no ground for withholding such allowance when the libellants themselves furnish the substitute'" (pp. 847, 848).

The Circuit Court of Appeals for the First Circuit adopted and applied the doctrine of *The Cayuga* in the case of *The Providence,* 98 F. 133 (C. C. A. 1). In that case the court said:

> "Another proposition submitted to us is met by *The Cayuga,* and that is the fact that the owners of 'The Providence' kept another boat for winter service, with which they immediately replaced 'The Providence' for the balance of her season. In this respect, the case at bar follows *The Cayuga,* where the fact that her owners substituted another ferryboat, which they kept for emergencies, did not defeat the allowance of demurrage, estimated in the way which we have explained. This rule was expressly approved in *The Favorita,* 18 Wall. 598, 603, and apparently approved in *The Conqueror,* at pages 128, 129, 166 U. S., and page 517, 17 Sup. Ct." (p. 136).

The same court approved the rule in *The Emma Kate Ross, supra,* and again applied the doctrine of *The Cayuga* in the case of *The Priscilla,* 55 F. (2d) 32. In that case the court allowed the libellant the market value of the use of one of its barges ordinarily in service in the port of New York,

which was towed to Boston and there used to replace the damaged vessel owned by the same owners.

The Circuit Court of Appeals for the Ninth Circuit applied the same rule in *The State of California*, 54 Fed. 404. The Court there awarded the libellant "a fair estimate of the value of her use during the time of her detention" (p. 407), although a sister ship had been substituted, and said:

> "The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency. Upon consideration of the evidence, we are satisfied that the amount allowed for demurrage is reasonable."

The English courts have adopted the same rule—*The Mediana*, 1900 A. C. 113 (House of Lords).

The decision of the Circuit Court of Appeals cannot be justified on the theory that the substituted vessels would have been idle during the period of substitution and that for this reason damages must be limited to the extra expense of operating the substituted vessel. To deny compensation at market rates on this basis is directly in conflict with the doctrine of the spare boat cases, which we have cited, which proceed on the assumption that the substituted vessel would have been idle.

Moreover, such a theory is unsound in principle. If the owner of vessels A and B can recover market rates for the use of A when substituted for B, only if A would have been employed at market rates in any event, it is evident that the owner in such case is still uncompensated for the

loss of use of one of his vessels as he would have received market rates for the use of vessel A if there had been no collision. He would then be receiving from the tort feasor for the use of vessel A only what he would otherwise have received from some one else and he is still uncompensated for the loss of use of B (or the loss of the business A would otherwise have done).

To view the matter from another angle, suppose several vessel owners have vessels which are not in use and are available as substitutes, but the owner of the injured vessel has none. Undoubtedly the injury to vessel B makes employment available for some vessel which otherwise would have had none. Any one of the other vessel owners can of course supply his vessel as a substitute and receive the market rate. To deny the same privilege to the owner of vessel B when he owns another vessel of the same type is to discriminate against him as an owner of vessels of the class in question and to penalize him for having two vessels. He alone of the entire class of owners of vessels of the given type is not permitted to obtain for his vessel the employment at market rates made available by the tort from which he has suffered. We submit such a result is not justice and is not in accordance with the equitable principles by which the admiralty courts are guided.

Neither can the decision of the Circuit Court of Appeals be justified on the theory that there would have been no work for the injured vessel (R. 79) for the testimony is uncontradicted that there was work available to occupy the time of the "Integrity" for full working hours each day.

It was on the principle that it must be shown that there was work available for the injured vessel that the Circuit Court of Appeals based its decision in *Newtown Creek Towing Co.* v. *New York,* 23 F. (2d) 486. But that is not this case.

Neither does this case fall within the scope of the decision in the *Glendola,* 47 F. (2d) 206 (C. C. A. 2), relied on by the Government and cited by the Circuit Court of Appeals. In that case the expense of a smaller substituted vessel was allowed but the owner claimed additional damages for the difference in capacity between the substitute and the injured vessel whose services were lost. The libellant, however, failed to prove any additional use of its other vessels or any "embarrassment to its business in general" and, therefore, failed to lay any basis for an additional award. On the contrary in this case it appears definitely that the "Integrity's" sister boats were worked extra hours to the equivalent of the service of an additional tug.

*The Conqueror,* 166 U. S. 110, cited by the Circuit Court of Appeals, is not an authority for disallowance of the claim. On the contrary that case recognized and approved the validity of the decisions in the spare boat cases, *The Cayuga,* and *The Favorita, supra.* That case held merely that the facts justifying the recovery must be proven with reasonable certainty and that under the circumstances of that case the libellant, the owner of a yacht used only for pleasure, had failed to establish a pecuniary loss.

We submit that the only basis on which the Circuit Court of Appeals distinguishes the spare boat cases, that is,

> "in no event do we think that the doctrine applies when the time lost is made up by boats which are not maintained as spares" (R. 79),

is arbitrary, untenable, unsound and not justified by reason or authority. To say that the right of a party injured by another's tort to recover damages depends upon whether or not he has definitely formulated in his mind a certain plan of operating his vessels, is to set up an impracticable and unjust criterion.

The Circuit Court of Appeals has said in effect that the use of the "Integrity's" sister tugs for extra hours had no value. We submit in the language of Mr. Justice Woodruff in *The Cayuga, supra*:

> "It is not true that the use of this boat (these boats) has in fact or in law, no value."

The damages allowed to the libellant by the District Court were the market value of the use of the "Integrity" during the time of detention, that is, what the libellant would have had to pay if it had hired a similar vessel (R. 28, 70, 73). This rate has not been contested (R. 79, 77). This is the measure of damage established by the rule of this court. In the case of *The Potomac,* 105 U. S. 630, 631, this court said:

> "In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum,* the owners of the injured vessel are entitled to recover for the loss of her use, while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered."

And in *The Conqueror,* 166 U. S. 110, 127, this court said:

> "The best evidence of damages suffered by detention is the sum for which vessels of the same size and class can be chartered in the market."

## *CONCLUSION.*

***The decision of the Circuit Court of Appeals should be reversed and the decree of the District Court affirmed.***

Respectfully submitted,

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
*Counsel for Petitioner.*

FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

No. 39.

BROOKLYN EASTERN DISTRICT TERMINAL,

*Petitioner,*

—against—

UNITED STATES OF AMERICA, on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

## REPLY BRIEF FOR PETITIONER.

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
*Counsel for Petitioner.*

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The petitioner did incur expense to replace the service of the "Integrity" and the fact that the major part of this expense, consisting of the cost of acquiring and maintaining more tugboats than required at full capacity for petitioner's business and thereby maintaining spare or reserve capacity, was incurred prior to the accident, does not justify the contention that the petitioner has suffered no loss, or that the substituted service supplied by petitioner was of no value. The case is squarely within the authority of the spare boat cases and petitioner is entitled to an award based on the market value of the substituted service... 1-7

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## *REPLY BRIEF FOR PETITIONER.*

In the brief for the United States an attempt is made to distinguish this case from those involving "spare boat" doctrine, because it is said that

> "in those cases decision went upon the ground that the vessel owner, having incurred expense in maintaining an extra boat to handle his work when boats regularly employed were laid up for repairs, was entitled to recover damages for demurrage while the spare boat was used to replace the injured vessel. In the instant case the petitioner did not maintain a spare boat or incur any expense to replace the service of the injured vessel" (p. 7).

A similar statement occurs at page 16.

We submit that this statement is erroneous and begs the question presented by the case.

The petitioner did, in effect, maintain an extra boat

(or boats) to handle his work when boats regularly employed were laid up for repairs and did in the maintenance of such spare boat (or boats) and otherwise incur expense to replace the service of the injured vessel.

In the present case the two tugs which were used as substitutes for the "Integrity" were ordinarily operated a single shift of ten hours per day. In order to substitute for the "Integrity" they were operated the requisite number of additional hours per day each overtime, thus furnishing a substitute for the "Integrity" out of their spare and otherwise unused capacity. The situation would have been in no way different if one of these boats had been set aside for use only as a spare and the ordinary work of the petitioner divided between the "Integrity" and the other boat. If this plan had been followed even the United States would admit that the use of the vessel so set aside as a spare boat would come within the doctrine of the spare boat cases and the petitioner would be entitled to compensation for her use.

Yet the situation here is in no degree different. The expense to the petitioner of owning and maintaining three tugboats would be identical whichever plan of operation was adopted, that is whether one boat was set aside as a spare, or whether all three were operated part-time and spare or reserve capacity maintained for use in emergencies when one of the vessels should be disabled by collision or otherwise. The petitioner was under the identical "expense to replace the service of the injured vessel" as were the libellants in the spare boat cases whose authority is recognized by the Government, as well as ourselves.

But it is said that this case is different from the spare boat cases because in those cases the substituted vessel was set aside as a spare while here all three of petitioner's tugs were regularly operated and the substitute was furnished out of the spare and otherwise unused capacity of the other

two. We can see no distinction. As we have pointed out, there was no difference in expense to the petitioner. Moreover, there is no requirement in the spare boat doctrine that the spare boat must be completely idle, except during those periods when she is called upon to operate as a spare. In fact, it appears definitely in some of the decisions that this was not the case. In the case of *The New Haven Steamboat Company* v. *The Mayor, etc.*, 36 Fed. 716 (S. D. N. Y.), as pointed out in our principal brief (p. 9), the spare boat used was a sister boat kept by the libellants—

> "for the purpose, *in part*, as appears from the evidence, of continuing the trips of the line with regularity, in case of accident to one of the regular boats, or during their repair. She was also occasionally let out for excusions, and upon special charters" (p. 717). (Italics ours.)

Similarly in the case of *The Providence*, 98 Fed. 133 (C. C. A. 1), the substituted sister vessel was another boat kept for winter service in the line.

There is nothing in the language or reasoning of the opinions in the other spare boat cases which would indicate that the decision would have been different if it had appeared that the spare boat had been partially employed.

Moreover, as pointed out in our principal brief, the attempted distinction between this case and the spare boat cases on the ground that the petitioner had not definitely formulated and declared a policy of maintaining spare boat capacity for emergencies is arbitrary, insubstantial, impractical and not justified by reason or authority. To say that a man's right to damages is dependent on his state of mind at the time his injury was sustained is to set up an unworkable standard and to put a premium on dishonesty.

In the Government's brief it is said at page 7:

> "An award for demurrage in this case would therefore be more than compensatory, would result

> in the recovery of money which the petitioner has not lost, and would leave him richer than if his vessel had not been injured" (p. 7).

and again at page 17 it is said that an award to the petitioner for demurrage in this case "would be a windfall for petitioner". These statements are in substance a repetition of the rejected arguments made by the respondents in the spare boat cases.

In those cases it was contended by the respondents that inasmuch as the libellants had already incurred the expense of acquiring and maintaining a spare boat the libellants had incurred no additional expense as a result of the collision and could recover nothing for the use of their spare boat.

As was said by the Court in *The Cayuga*:

> "It is quite obvious, that there is neither justice nor equity in allowing to a tort-feasor the benefit of this large outlay made by the libellants to enable them to serve the public and run their ferry without interruption; and yet that is the effect of yielding to the argument that, because such spare boat was already in the libellants' possession, and was used, therefore the libellants sustained no pecuniary loss by the delay. If it be conceded that a just allowance for the necessary cost of another boat, hired at its fair value to perform the service, would be necessary to the indemnity of the libellants, there is no sound reason, I think, for withholding such allowance when the libellants furnish the substituted boat themselves. * * * It is not true that the use of this boat has, in fact or in law, no value." *The Cayuga*, 7 Blatch. 385, Fed. Case No. 2537, affirmed 81 U. S. (14 Wall.) 270, 278.

See also:

> *The Emma Kate Ross*, 50 Fed. 845, 847, 848 (C. C. A. 3rd).

It is asserted in the Government's brief (p. 16) that the petitioner has not shown that there was extra expense to the petitioner in operating the two tugs overtime and that "in overtime cases such as this" the additional cost of overtime operation must be shown, a statement which again begs the issue. There can be no doubt that there was such expense but in petitioner's view of the case it was quite unnecessary to show the amount.

In addition to the expense to the libellants of capital outlay, overhead and depreciation involved in maintaining spare tugboat capacity, and the recognized extra expense of overtime operation, it is an indubitable fact that the operation of the two sister boats of the "Integrity" extra hours involved actual expense to the libellant of additional wear and tear on the vessels. In the nature of things it is practically impossible to estimate actually in dollars and cents this element of cost to the petitioner but this item of expense is none the less real. However, such an estimate is not necessary for under the authorities the petitioner is not limited in its recovery to the actual cost of the substituted service when supplied by itself. The rule of the spare boat cases is that when the owner supplies the spare boat he is entitled to be compensated for the use of that boat on the basis of its market value which, of course, includes not only such more or less indefinite elements of expense but a reasonable profit or compensation for the use of the substituted vessel. The measure of the allowance to the libellant in such cases is:

> "The necessary cost of another boat, hired at its fair value to perform the service." *The Cayuga, supra.*

In other words, the libellant is entitled to the same compensation for the use of his boat as he could obtain by rendering the same service to someone else at market rates, or the same amount which he would have to pay

to someone else to secure similar services of a vessel not owned by himself. Such compensation of course, includes a fair profit in addition to the actual expense. Any other rule would be to allow a tort-feasor, in part at least, the benefit of the petitioner's outlay to avoid interruption of its service in emergencies such as that caused by the disablement of the "Integrity" resulting from the collision with the "Raritan".

The market value of the services lost or supplied is recognized as the true measure of damages in the decision of this Court in *The Potomac,* 105 U. S. 630, 631.

The suggestion that although there was extra wear and tear on the substituted vessels, there was a saving in wear and tear in the "Integrity" while undergoing repairs which should be taken into consideration is without merit. If valid; this would lead to the proposition that in cases where a substitute was hired, the owner could not recover the full amount paid for the substitute but must deduct therefrom an allowance for saving in wear and tear on the injured vessel while under repairs. This is not the rule and we believe no authority can be cited for such a proposition.

The cases cited in the Government's brief, where damages for loss of use have been disallowed, *The Conqueror,* 166 U. S. 110; *The North Star,* 151 Fed. 168 (C. C. A. 2d); *The Winfield S. Cahill,* 258 Fed. 318 (C. C. A. 2d); *Cuyamel Fruit Co.* v. *Nedland,* 19 F. (2d) 489 (C. C. A. 5th); *Newtown Creek Towing Co.* v. *City of New York,* 23 F. (2d) 486 (C. C. A. 2nd) are all cases where damages for loss of use were disallowed either because it appeared that the *vessel damaged* would not have been profitably employed during the period of her layup for repairs, or there was no showing that she would have been. This is quite a different situation from the cases such as the present where there is no doubt but that the vessel damaged would have been employed and a substitute has actually been furnished.

In *The Wolsun*, 14 F. (2d) 371 (C. C. A. 5th), the vessel was under charter and there was no showing that her owner had not received charter hire during the period of repair. As we read *The Glendola*, 47 F. (2d) 206 (C. C. A. 2d), it was not there held that damages could not be allowed for embarrassment of the owner's business in general but that under the circumstances of that case there could be no award since no definite sum could be attributed as damages due to the detention.

We regard the decision in *The Mediana*, 1900 A. C. 113 as clearly supporting the petitioner's right to recovery in this case and as already indicated we differ entirely from the view expressed by the government that there has been a failure on the part of the petitioner in this case to prove any actual loss.

The question presented is whether, because the petitioner's loss and expense in maintaining surplus tugboat capacity had been largely incurred prior to this accident, the Government as a tort-feasor is to be permitted to have the gratuitous benefit of the petitioner's substantial outlay. Our position is that taken by the court in the decision in *The Cayuga, supra*—

> "that there is neither justice nor equity in allowing to a tort-feasor the benefit of this large outlay * * *."

## *The Amount Awarded.*

In the brief for the United States the amount of the award to the petitioner for demurrage is now attacked. The Government did not assign error in the Circuit Court of Appeals on the ground that the amount awarded to the libellant was excessive (Assignments of Error, R. 77). The Circuit Court of Appeals in its opinion commented that—

> "The respondent does not object to the amount fixed as reasonable hire for the supposititious substitute, * * *" (R. 79).

If, however, it is not too late for the Government to raise this question at this time, the answer to the Government's argument is plain. It is argued first that the period for which detention was allowed by the District Court was too long and that demurrage must, in any event, be limited to the number of days specified in certain bids which were tendered for the making of these repairs.

The facts are that bids were obtained from several yards ranging from $25,850.00 to $27,000.00 for the repairs and specifying periods from 30 to 32 days for the completion of the work. These bids were regarded as too high and were rejected under the advice of experts (R. 23). It was decided that the work could be done for considerably less on a day's work basis under supervision of the accounting firm of Alley Eells & Company and the work was given to the Vulcan Iron Works on this basis (R. 24). However, conditions in all shipyards were very crowded at this time (R. 43). There were delays which were unavoidable under the circumstances (R. 40, 44) and the saving in cost of the repairs was much less than was anticipated.

The Government's criticism of the allowance to the petitioner by the District Court is, however, based on hindsight, whereas the fair test to be applied to the libellant's claim is whether or not the libellant acted as a reasonable man should have under the circumstances to minimize the damages. This is a question of fact which was decided favorably to the petitioner both by the Special Commissioner (R. 70) and the District Court (R. 72-74).

The Special Commissioner pointed out that the mode of repair adopted by the petitioner by days' labor is authorized by the decisions and that the judgment of petitioner's experts was not challenged by any expert testimony offered by the Government. He held that petitioner's conduct was not to be judged by hindsight and allowed demurrage for the period of the actual detention (R. 70).

The District Court affirming the Commissioner's report, commented that in view of the fact that at the time of the collision libellant was not entitled to sue the United States there was no ground for attributing, or even suspecting, a motive to increase damages and that the course pursued, based on the advice of experts, was reasonable (R. 72). Dealing specifically with the question of the period for which demurrage was allowed, the Court said:

> "Inasmuch as upon the evidence application of the extract quoted requires approval of the method by which the libellant procured the repairs to be made, it follows necessarily as an incident (reasonably prudent conduct having appeared) that the period during which libellant was deprived of the service of the tug cannot be treated as unduly long" (R. 73-74).

The Circuit Court of Appeals in its view of the case deemed it unnecessary to consider whether the period was unreasonably prolonged (R. 79).

The Government also questions the amount of the allowance to the petitioner which was based on the market value of the services of the "Raritan" or her substitute (R. 28, 70, 73). This rate is now questioned because of the statement elicited from petitioner's witness that it was more economical than hiring outside tugs. This statement, of course, referred to the fact that the petitioner's expense for maintaining spare boat capacity had already been incurred and to hire an outside tug under the circumstances would have been to incur double expense. The rate allowed by the District Court was the market rate and was proper under the decisions we have cited.

The Government has requested, that if the Court is of the opinion that demurrage should be allowed, the case be remanded with directions for further proceedings to assess the damages. Similarly, we would request that if

the Court is of the opinion that the theory on which damages for detention were allowed by the District Court was wrong but that an allowance based on a different theory or measure of damages might be justified, that the case be remanded with directions for further proceedings for the assessment of the damages.

Respectfully submitted,

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
*Counsel for Petitioner.*

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No. 39

# In the Supreme Court of the United States

OCTOBER TERM, 1931

BROOKLYN EASTERN DISTRICT TERMINAL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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# In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 877

BROOKLYN EASTERN DISTRICT TERMINAL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 291–294) is reported in 54 F. (2d) 978. Portions of the report of the Special Commissioner appointed to assess damages (R. 266–271) and of the opinion of the District Court confirming his report (R. 275–278), are reported in 1931 A. M. C. 341–347.

## JURISDICTION

The judgment sought to be reviewed was entered January 18, 1932. (R. 294.) Petition for certiorari was filed April 15, 1932. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether demurrage should be allowed for the period a damaged tug, engaged with two other tugs belonging to the same owner in towing car floats, is withdrawn from service for repairs, when the other two tugs did all the towing formerly done by the three.

**STATUTE INVOLVED**

The Act of February 16, 1925 (c. 241, 43 Stat. 1566), provides as follows:

> That the claims of the Brooklyn Eastern District Terminal, a corporation organized and existing under the laws of the State of New York, with its principal place of business in the city of New York, in said State, owner of the tugboat Integrity, against the United States for damages alleged to have been caused by collision beween the said tugboat and the United States hopper dredge Raritan, in New York Harbor, New York, on or about the 30th day of September, 1920, may be sued for by the said Brooklyn Eastern District Terminal in the United States District Court for the Southern District of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such

damages and costs, if any, as shall be found due against the United States in favor of the Brooklyn Eastern District Terminal, or against the Brooklyn Eastern District Terminal in favor of the United States upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal: *Provided,* That such notice of the suit shall be given to the Attorney General of the United States as may be provided by the order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further,* That said suit shall be brought and commenced within four months of the date of the passage of this Act.

Approved, February 16, 1925.

STATEMENT

A libel in admiralty was filed May 7, 1925, under authority of the Act of February 16, 1925, *supra,* in the District Court for the Southern District of New York by petitioner, as owner of the steam tug *Integrity,* against the United States, as owner of the dredge *Raritan,* to recover damages arising out of a collision between those vessels in New York Harbor on September 30, 1920. (R. 2–10.) A cross libel was filed to recover damages sustained by the *Raritan.* (R. 16–20.) The court, after receiving evidence, held both vessels at fault and de-

termined that the damages should be equally apportioned between the two owners. (R. 102.)

A Special Commissioner, appointed to determine the amounts of damages suffered by the parties (R. 103–104), after taking testimony (R. 105–185) and receiving other evidence (R. 186–265), made a report (R. 266–271), which included an item of $11,700 for demurrage for the period the *Integrity* was withdrawn from service for repairs (R. 270). He stated that during this period the other tugs of the petitioner had to work longer hours, undergoing excessive wear and tear, or else neglect available work. The demurrage was determined by taking the going market rate of hire for tugs, which was $15 an hour for a ten-hour day, for the seventy-eight days required for the repairing. (R. 270.) The District Court confirmed the report of the Commissioner as to the item for demurrage. (R. 276.) The Circuit Court of Appeals reversed the District Court as to demurrage and disallowed that item. (R. 294–295.) Whether this demurrage should have been allowed is the only question involved in the instant petition.

This libel was filed and the opinion of the District Court was rendered before Admiralty Rule 46½ (281 U. S. 773) became effective. Therefore, in the absence of specific findings, the proofs, which are not in dispute, may be summarized. Cf. *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 533.

The *Integrity* was used solely in petitioner's business, which consisted of acting in conjunction

with various railroads as a transfer medium in New York Harbor. Three tugs were used by petitioner for this work. (R. 115–117.) The *Integrity* was laid up for seventy-eight days while the damage resulting from the collision in question was being repaired. (R. 115.) During this period towage usually handled by the *Integrity* was handled by the other two of petitioner's tugs by working extra time, but without hiring additional crews. (R. 117, 118.) This practice was followed in preference to hiring an extra tug because it was believed to be more economical. (R. 119.) There was opinion testimony to the effect that the increased use of the two tugs tended to make them wear out more quickly, but it was stated that it was not possible to estimate the extra cost of this wear, although materially less than the cost of hiring an additional tug. (R. 119–120.) There was no definite evidence that either of the other two tugs had to be repaired after the *Integrity* returned to service because of the extra work or that petitioner incurred any other extra expense or lost any profit because of the *Integrity's* temporary removal from service. (R. 119–120.) The court below held that no extra expenses of overtime for the two tugs actually used had been proved. (R. 292.) The petitioner does not assert that such extra expense was proved.

## ARGUMENT

This Court has held that if a boat is damaged so that it must be taken from regular service to be re-

paired, and another boat, maintained by the owner for such emergencies and not otherwise used, takes its place, demurrage may be recovered for the repair period as compensation for the expense of maintaining the extra boat. *The Cayuga,* 7 Blatch. 385, affirmed, 14 Wall. 270; *The Favorita,* 18 Wall. 598. This is known as the "spare boat" doctrine. It is based on the theory that, since expense would be incurred in hiring a boat for the emergency for which compensation would be allowed, it should also be allowed where a spare boat is kept by the owner so that it is not necessary to hire an outside boat. The demurrage in the latter case covers the extra cost of maintaining the spare boat.

Petitioner contends that, although it did not maintain a spare boat or hire an extra tug to help carry on its business while the *Integrity* was being repaired, it is entitled to demurrage for this period because its other two tugs were required to work overtime in order to do the towing ordinarily done by all three. No additional crews were hired, and there was no evidence that any extra expense was incurred or profits lost. It was admitted that it was more economical to work the two tugs overtime, as petitioner did, than to hire an additional tug at $150 a day for the repair period, although the rate of hire of tugs was the basis on which the demurrage, allowed by the Commissioner and the District Court, was computed. (R. 119.)

We believe that the decision of the court below, disallowing the demurrage item, was correct, be-

cause petitioner failed to prove the elements necessary for it to recover under the "spare boat" doctrine or to establish any other basis for allowance of demurrage. Where a spare boat is kept to take the place of the boat being repaired, its owner has actually incurred an additional expense in maintaining the extra vessel for emergency use and, under applicable decisions of this Court, he is entitled to be compensated. Likewise, if he has hired another boat from an outside owner he has suffered a loss which can be exactly computed and for which compensation should be awarded. If demurrage is sought for any other reason, it has been settled by this Court that it will be allowed only when expense has actually been incurred or a profit lost, and this has been shown with reasonable certainty. The mere detention of a vessel while being repaired does not give rise to demurrage. *The Conqueror,* 166 U. S. 110, 125; *The Glendola,* 47 F. (2d) 206 (C. C. A. 2d), certiorari denied, 283 U. S. 857.

In the instant case the only extra loss claimed was that resulting from the additional wear and tear resulting to the two tugs because of the additional time they were engaged each day. Petitioner's witness Kilpatrick, when asked for his opinion of the amount of such wear and tear, stated that it was impossible to estimate it. (R. 119.) No evidence was submitted as to any subsequent repairs or reconditioning of the two tugs, or to show that their useful lives had been shortened by the extra burden cast upon them while the *Integrity* was tem-

porarily out of service, although ten years had elapsed between the time of the repairs to the *Integrity* and the hearings before the Commissioner. (R. 120.) Under these circumstances the proof of loss from wear and tear was, at most, conjectural, and there is nothing in the record tending to show with reasonable certainty the amount of such loss, if there has been any. Consequently it is clear under the settled principles of law announced by this Court that a basis for recovering demurrage has not been established. The petitioner was not entitled to collect the cost of chartering a tug which it did not charter, nor to recover the value of the use of a "spare boat" which it did not maintain. The court below recognized the authority of the decisions of this Court applying the "spare boat" doctrine, but correctly held those decisions inapplicable and applied the principles announced in another decision of this Court and in one of its own recent decisions which this Court declined to review (*The Glendola, supra*), to the particular facts of this case.

Petitioner asserts that the decision of the court below is in conflict with that of the Circuit Court of Appeals for the First Circuit in *The Priscilla*, 55 F. (2d) 32, petition for certiorari now pending as *Doane-Commercial Towing Co.* v. *Mexican Petroleum Corp.*, No. 903, October Term, 1931. The petition in that case also alleges a conflict between the decisions of the two courts. We believe that the cases are distinguishable and represent the

application of the same principles to different sets of facts. In the *Priscilla* case a barge ordinarily used in the New York business of its owner was brought to Boston Harbor to be temporarily substituted for a damaged barge to do a part of the owner's business handled at Boston. Recovery of demurrage was allowed to the owner for the period during which the substituted barge was used or in transit to Boston. The court in that case pointed out (*supra,* p. 38) that, whereas the owner was able to handle all its Boston business by using the substituted barge, it was a fair inference that the substituted barge, if left in New York during the period of substitution, would not have been an idle boat but would have been profitably employed. It thought the evidence justified such a finding, and it so found. If this were true it is clear that in bringing the barge to Boston the owner lost profits which it would have earned if the barge had been left in New York. Accordingly, the elements necessary for allowing demurrage as pointed out above were shown. The crux of all the cases in which demurrage is sought by invoking the "spare boat" doctrine is whether or not proof of actual loss and the amount thereof are shown with a fair degree of certainty. We believe this proof had not been made in the instant case. The Circuit Court of Appeals for the First Circuit made a finding that there had been ascertainable loss in the *Priscilla* case. This difference distinguishes the two decisions.

## CONCLUSION

The decision below is correct. It conforms to the principles laid down by this Court, and we believe that there is no conflict of decisions. The decision turned upon the application of settled rules to the particular facts in this case. The petition should be denied.

Respectfully submitted.

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MAY, 1932.

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No. 39

# In the Supreme Court of the United States

OCTOBER TERM, 1932

BROOKLYN EASTERN DISTRICT TERMINAL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1932

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No. 39

BROOKLYN EASTERN DISTRICT TERMINAL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 78–81) is reported in 54 F. (2d) 978. Parts of the report of the Special Commissioner (R. 67–70) and of the opinion of the District Court confirming his report (R. 72–74) are reported in 1931 A. M. C. 341–347.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 18, 1932. (R. 81–82.) Petition for certiorari was filed April 15, 1932. The

writ was granted by this Court May 23, 1932. (R. 82.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether petitioner should recover demurrage for the period one of its tugs, damaged partly through the fault of a dredge of the United States, was withdrawn from service for repairs, when two other of petitioner's tugs, regularly employed together with the damaged tug in towing car floats, did all the towing usually done by the three without additional expense of any kind to the petitioner.

2. Whether, if demurrage should be allowed in this case, the finding by the Special Commissioner as to its amount is excessive.

### STATUTE INVOLVED

The Act of February 16, 1925 (c. 241, 43 Stat. 1566), provides as follows:

> That the claims of the Brooklyn Eastern District Terminal, a corporation organized and existing under the laws of the State of New York, with its principal place of business in the city of New York, in said State, owner of the tugboat *Integrity,* against the United States for damages alleged to have been caused by collision between the said tugboat and the United States hopper dredge *Raritan,* in New York Harbor, New York, on

or about the 30th day of September, 1920, may be sued for by the said Brooklyn Eastern District Terminal in the United States District Court for the Southern District of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damages and costs, if any, as shall be found due against the United States in favor of the Brooklyn Eastern District Terminal, or against the Brooklyn Eastern District Terminal in favor of the United States upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal: *Provided,* That such notice of the suit shall be given to the Attorney General of the United States as may be provided by the order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further,* That said suit shall be brought and commenced within four months of the date of the passage of this Act.

**STATEMENT**

Petitioner filed a libel in admiralty May 7, 1925, under the authority of the Act of February 16, 1925, *supra,* in the District Court for the Southern District of New York to recover damages against

the United States as owner of the dredge *Raritan*, sustained by the steam tug *Integrity* arising out of a collision between these vessels in New York Harbor on September 30, 1920. (R. 2–6.) The United States filed a cross libel to recover for injuries received at the time by the *Raritan*. (R. 9–11.) The trial court, after hearing the proofs of the parties, held both vessels at fault for the collision and determined that the damages to each vessel should be equally apportioned between the two owners, and it appointed a Special Commissioner to determine and report to it the damages suffered by each party. (R. 18.)

A hearing was had before the Commissioner at which testimony (R. 19–66) and other evidence (R. 66–67) was offered. The Commissioner then reported his findings as to the damages sustained (R. 67–70), which included repair bills for the *Integrity* totalling $23,614.57, and a charge of $2,550.00 for supervision of this work and a survey fee. He also allowed the petitioner demurrage for a period of 78 days for the time the *Integrity* was withdrawn from service for repairs, at $150 a day, making a total amount of $11,700 for this item. He found $150 a day to be the "going market rate," evidently, for the hire of such tugs. In explanation of the allowance of the demurrage item the Commissioner stated that, during the period the *Integrity* was laid up, petitioner's other tugs had to "work longer hours, undergoing excess wear and tear, or to neglect available work." The District Court affirmed

the allowance of this item for demurrage. (R. 72–73, 75–76.) Upon appeal the Circuit Court of Appeals reversed the decision of the District Court as to demurrage, disallowing it. (R. 82.) The only question at issue at the present stage of the proceedings is whether petitioner should receive damages for demurrage.

No specific findings have been made, but as the libel was filed and the opinion of the District Court rendered before Admiralty Rule 46½ (281 U. S. 773) became effective, the evidence relating to the demurrage item may be summarized. Cf. *Taxpayers* v. *Jackson,* 283 U. S. 527, 533.

The petitioner was not engaged in commercial towing for hire, but it maintained a fleet of three tugs, one of which was the *Integrity,* for the sole purpose of towing car floats in connection with its business of acting as a transfer medium between points in New York Harbor in conjunction with various railroads. (R. 27–29.) The *Integrity* was out of service for a period of 78 days while the damage resulting from the collision in question was being repaired. (R. 26–27.) During this time petitioner's other two tugs, by working additional hours, performed the towing usually done by all three. (R. 29–30.) This was accomplished without employing additional crews. Petitioner's Superintendent of Equipment and Structure, Mr. Kilpatrick, who testified to the above effect, gave opinion testimony tending to show that by working the other two tugs overtime, they wore out more

quickly, but he stated that it was not possible to estimate the extra cost of this wear although he thought it was materially less than the cost of hiring an additional tug at the regular rate of $150 a day. (R. 30.) There was no definite evidence showing that either of the two tugs had to be repaired because of the extra work or that petitioner incurred any other extra expense or lost any profit because of the *Integrity's* removal from service, although the hearing was held nearly 10 years after the collision. (R. 30–31.) The court below was of the opinion that petitioner was in the same position as it would have been, except for any expenses of overtime which were not proved, had the *Integrity* remained in service. (R. 79.)

Kilpatrick testified that, after the collision, estimates for the repair work were obtained which included bids from five different parties, the top prices being $27,000, and all of the bidders offered to do the repairing within a period of about one month. (R. 21–22.) Petitioner rejected these bids on the advice of its own surveyors because it thought the work could be done for less on a per diem basis. (R. 23–24.) The repairs were made on this plan. (R. 24.)

## SUMMARY OF ARGUMENT

In this case the petitioner has been awarded the cost of repairing its tug. In addition it seeks demurrage at the rate of $150 a day for 78 days, the time consumed in repairing the tug. By working

its two other tugs overtime petitioner was able to do all of the work which could have been done during this period by the three tugs. There was no evidence that petitioner lost business, incurred expense, or otherwise suffered damage as a result of the detention. Accordingly, under the principles laid down by this Court in *The Conqueror,* 166 U. S. 110, and followed consistently since that decision by the Federal courts, the petitioner may not recover anything for the detention of its vessel.

Cases involving the "spare boat" doctrine are not in point because in those cases decision went upon the ground that the vessel owner, having incurred expense in maintaining an extra boat to handle his work when boats regularly employed were laid up for repairs, was entitled to recover damages for demurrage while the spare boat was used to replace the injured vessel. In the instant case the petitioner did not maintain a spare boat or incur any expense to replace the service of the injured vessel. An award for demurrage in this case would therefore be more than compensatory, would result in the recovery of money which petitioner has not lost, and would leave it richer than if its vessel had not been injured.

It took 78 days to repair the injured boat in the instant case. The work was done on a per diem basis. Petitioner was under an obligation to minimize its damage and if demurrage was recoverable it should be limited to the period within which the work could have been done under bids for comple-

tion of repairs in about a month which petitioner received and rejected.

In any case the recovery was excessive in allowing demurrage at the rate of $150 a day because it appears that by working the two tugs overtime the cost of handling the work usually done by the injured tug was much less than it would have been to hire a tug in the open market for $150 a day.

**ARGUMENT**

As a result of the damages received by the *Integrity* in its collision with the *Raritan,* petitioner has been awarded $23,614.57 to cover the cost of repairing the *Integrity* and has also been allowed $2,550 as expenses for supervision and a survey fee in connection with this work. It contends that it should also be awarded $11,700 for demurrage to compensate for losing the use of the *Integrity* during the 78 days it was removed from service. This item was based upon the cost of hiring another tug in the open market at $150 a day for 78 days to take the place of the *Integrity* while being repaired.

As a matter of fact no such additional tug was hired, and by working overtime its other two tugs, which were ordinarily engaged with the *Integrity* in handling petitioner's business of towing car floats, and without hiring additional crews, petitioner was able to do its regular towing work without any loss of profits or without being put to any additional expense during this period. Its officer in charge of the construction and maintenance of

vessels and tug boats testified that the reason the towing ordinarily handled by the *Integrity* was taken care of in this manner was because it was much more economical than to hire an additional tug at the regular daily rate. He did testify that he was of the opinion that the two tugs tended to wear out more quickly because of this overtime work, but he was unable to give any approximation of what the amount of this additional wear might be. He stated further that after the *Integrity* returned to service he did not remember that the other boats had to be laid off to make special repairs required by the extra service, and, although his testimony was given nearly 10 years after the collision, he was unable to state any facts indicating that the two tugs wore out or were wearing out more quickly than they would have if the *Integrity* had not been taken from service for repairs. It might be noted that if, as the witness Kilpatrick stated, the two tugs tended to wear out more quickly because of doing the work ordinarily done by the three, by the same token, the *Integrity*, being relieved from this service for the same period, would have its span of usefulness correspondingly increased.

In determining the damages recoverable in admiralty for injuries to a vessel arising out of a collision, and for other maritime torts, the same principles apply as govern suits at law of like nature for injuries to personal property, and the measure of the indemnity is coextensive with the

amount of the damage suffered. *The Baltimore,* 8 Wall. 377, 385–386; Cf. *Standard Marine Ins. Co.* v. *Assur. Co.,* 283 U. S. 284, 288. Damages in our system of law are based upon the principle of compensation to the injured party so that he will be in as good a position after the injury as if it had not occurred. *Miller* v. *Robertson,* 266 U. S. 243, 257. Under this principle compensation is given *only* for the injury actually suffered. *Ill. Cent. R. Co.* v. *Crail,* 281 U. S. 57, 63. In the instant case petitioner has been fully compensated for the cost of repairing its tugboat, and has failed to prove any other damage arising from the detention of the *Integrity.* Accordingly, we submit that, under settled principles, the action of the court below in disallowing the item of $11,700 for demurrage was clearly correct.

Apparently the last expression of this Court on the question involved here was in *The Conqueror,* 166 U. S. 110, where it was stated (p. 125):

> That the loss of profits or of the use of a vessel pending repairs or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have *actually* been, or may be reasonably supposed to have been, lost, and the *amount of such profits is proven with reasonable certainty.* (Italics ours.)

It was also said in the same case (p. 127)

> The damages must not be merely speculative, and something else must be shown than the simple fact that the vessel was laid up for repairs. * * *

It was held in that case that the evidence failed to establish that the owner of a yacht had been injured in the amount of the damages awarded him as a result of its detention by the Collector of Customs in New York. Evidently the detention lasted from August 27, 1891, to February 3, 1892 (p. 113). The decision in *The Conqueror* followed the rules laid down in *The Potomac,* 105 U. S. 630. In the latter case the question involved was the sum to be allowed for the detention of a vessel while being repaired as a result of damages received in a collision. This Court was of the opinion that sufficient proof of loss arising from the detention had been made and it affirmed the amount awarded in the courts below. However, in discussing the matter it stated (p. 632) that "the burden is upon the libellant to prove the extent of the damages actually sustained by him."

Since the decision in *The Conqueror, supra,* the Federal courts have consistently held that, in order to recover demurrage for detention of vessels injured in a collision, it is necessary to show that loss has actually been sustained as a result of this detention. In *The North Star,* 151 Fed. 168 (C. C. A. 2d), it was held that the disallowance of demurrage for detention of a vessel was proper, as

the vessel had refused to carry cargoes during this period because of the impending close of the shipping season. In *The Winfield S. Cahill,* 258 Fed. 318 (C. C. A. 2d), it was held that a vessel injured in collision should not recover demurrage for the period of her repairs because her owner, a German, "blacklisted" because of the state of war between the United States and Germany, would not have been able to earn anything during the repair period. In *The Wolsum,* 14 F. (2d) 371 (C. C. A. 5th), it was held that, since the evidence failed to show any loss of profits for use of a vessel pending repairs necessitated by a collision, damages should not be allowed for the period of detention. Also, in *Cuyamel Fruit Co.* v. *Nedland,* 19 F. (2d) 489 (C. C. A. 5th), demurrage was disallowed for the period of repairing a vessel because the owner had refused an offer to charter her during this period and there was no evidence that the vessel could have been chartered at the time at a price which her owner was willing to accept, the court reiterating the principle that in all such cases it was necessary to prove damages with reasonable certainty. In *Newton Creek Towing Co.* v. *City of New York,* 23 F. (2d) 486 (C. C. A. 2d), demurrage was not allowed for the period of detention for repairs to a tug because it appeared that the tug belonged to a fleet operated by its owner and that if the tug had not been laid up during this period, it would not have been operated due to the

lack of a demand for such services. Likewise, it has been held that demurrage should not be allowed for embarrassment to the owner's business in general, as no definite sum could be attributed to the detention, but the reasonable hire of a ship actually chartered to take the injured vessel's place was awarded. *The Glendola,* 47 F. (2d) 206 (C. C. A. 2d), certiorari denied, 283 U. S. 857.

Petitioner has cited a number of cases in support of its contention. *The Cayuga,* 7 Blatch, 385, affirmed, 14 Wall. 270; *The Favorita,* 18 Wall. 598; *New Haven Steamboat Co.* v. *The Mayor,* 36 Fed. 716 ( S. D. N. Y.); *The Emma Kate Ross,* 50 Fed. 845 (C. C. A. 3d); *The State of California,* 54 Fed. 404 (C. C. A. 9th); *The Providence,* 98 Fed. 133 (C. C. A. 1st); *The Priscilla,* 55 F. (2d) 32 (C. C. A. 1st), certiorari granted *sub nom. Doane-Commercial Towing Co.* v. *Mexican Petroleum Corporation,* 286 U. S. 540, dismissed per stipulation September 26, 1932. All of these cases involved applications of the "spare boat" doctrine. The basis of these decisions is that the owner of the injured vessel, anticipating a time when the vessel would not be available for regular service because of a collision or for other causes, had acquired and maintained an additional vessel for such emergencies so that he would not be required to hire a boat at the regular market rate to take the place of the injured vessel. Since he would have had to pay for such hire if he had not gone to the expense of maintaining the

extra boat, it is thought proper that those who caused the regular boats to be retired from service because of collisions should bear a part of the cost, commensurate with their fault, of the spare boats maintained to do the work of the regular vessels during such repair periods. The damages usually allowed where a spare boat is used are based upon the market rate of hiring a boat during the period of repairs. These cases fall within the principles laid down in *The Conqueror, supra,* that the loss arising from detention must be definitely shown, for the owner is actually out of pocket for the cost of acquiring and maintaining the spare boat used in such emergencies. Thus damages have been proved with reasonable certainty.

*The Priscilla, supra,* in particular, is relied upon by petitioner. In that case a definite finding was made that there had been ascertainable loss. The presence or absence of proof of such loss is, of course, the distinguishing feature in all of these cases. We believe that case and the instant one are clearly distinguishable on this basis and that the two cases represent the application of the same principles to different facts. In *The Priscilla,* a barge regularly employed in Boston Harbor was damaged. The owner brought one of his barges, ordinarily used about New York, to Boston to handle the business usually done by the damaged barge. Demurrage was allowed in that case for the period the substituted barge was in transit to and used in Boston. The Circuit Court of Appeals

pointed out (55 F. (2d) at p. 38) that, considering the facts, it was a fair inference that the substituted barge, if left in New York, would have been profitably employed. If this were the case, the owner of the barge lost profits by bringing it to Boston which would have been earned if it had been left in New York and, therefore, was entitled to demurrage as compensation.

Petitioner also has cited *The Mediana,* Appeal Cases 1900, 113. In that case a harbor board maintained six lightships. Five of these were regularly employed in the work of the board, the sixth one being kept to take the place of any of the others if they should be put out of service because of damages. The House of Lords held that substantial damages for the loss of the services of the damaged lightship during the time her place was taken by the substituted ship should be allowed. This was a clear case of the application of the "spare boat" doctrine, and the House of Lords appears to have been governed by the same considerations that were present in the "spare boat" cases in this country. *The Mediana* was distinguished from *The City of Peking,* 15 Appeal Cases, 438, in which it was held that loss from the detention of a vessel could only be recovered where there had been actual loss resulting therefrom and reasonable proof of the amount. It is apparent that if the English rule as stated in these cases were applied to the instant case, the result would

have been the same as that reached by the court below, because of the failure of petitioner to prove any actual loss.

Petitioner, characterizing the decision of the court below as arbitrary, untenable, unsound, and not justified by reason or authority, contends that since it operated two of its tugs overtime so as to do the work regularly done by the injured tug, its situation was not materially different from that in the cases where a spare boat is used and demurrage allowed. Reasoning by analogy, petitioner insists that the "spare boat" doctrine must be extended to such cases as this. There is a material difference between the two situations. In the case where a spare boat has been maintained and used the owner has actually paid out of his own pocket money to acquire and maintain the extra boat to take care of the emergency when one of his regular vessels is withdrawn from service. In the instant case petitioner has not shown that there was any extra expense involved in working the two tugs overtime. In overtime cases such as this the insufficiency of proof must always be apparent if the additional cost of overtime operation has not been proven. And to extend the "spare boat" doctrine to such cases would be to destroy the rule upon which it is predicated, namely, that recoverable loss must be proven with reasonable certainty—a rule which is satisfied in the "spare boat" cases by proof of rental value, but which can only be satisfied in

such cases as this by proof of the actual cost of overtime operation. An award to petitioner of $11,700 for demurrage would represent clear gain to it and it would be, to that extent, better off than if the *Integrity* had never been withdrawn from service. This would be a windfall for petitioner, clearly unauthorized by the settled principles regulating the award of damages to which we have adverted above.

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Even if damages for detention were recoverable on any theory the award was grossly excessive. The Special Commissioner awarded petitioner demurrage at the rate of $150 a day for 78 days. The repair work was done on a per diem basis because the petitioner's supervisor thought this would be more economical. The cost of repairing the *Integrity* on this basis amounted to $23,614.57 plus $2,550 for supervision and a survey fee. Before deciding to do the work on this plan, petitioner received bids from five different parties who made bids to do the repairing for prices ranging from $25,850 as the lowest to $27,000 as the highest. All of these bidders offered to do the work within a period of about one month. It does not appear whether, if one of these bids had been accepted, it would have been necessary to pay the item of $2,500 for supervision, but the natural inference would be that if the repair work was done by an independent contractor his bid would include all of the regular services necessary to do the repair-

ing. Consequently, if the bids from the independent contractors are compared with the actual cost of the repairing, it seems fair to add the amount of $2,500 for supervision, which would give a total of $26,114.57. If the petitioner intended to seek demurrage in addition to the cost of repairs it is clear that the familiar duty, resting on petitioner to minimize its damages, required it to take the bid of the contractor who would have done the work in the shortest space of time so that the total of the repair bill and the demurrage item should have been as low as possible. If one of the highest bids of $27,000 had been accepted the work would have taken 32 days. Demurrage for this period at $150 a day would be $4,800, making the total damages $31,800 on this basis. If one of the other four bids had been accepted the total cost would have been somewhat lower. The total of the items for repairing, supervision, and demurrage, as claimed by petitioner, is $37,814.57, or approximately $6,000 in excess of the total cost of repairs plus demurrage while the *Integrity* was under repair if one of the bids of the independent contractors had been accepted. No explanation was offered for the excessive period used by the petitioner for repair on the per diem basis. Since all of the five bidders were willing to do the work in less than one-half the time actually taken it seems quite apparent that to allow demurrage for 78 days would be grossly excessive.

If any demurrage at all was allowable, we submit that it should have been limited to a period of not more than 32 days and that the rate of $150 a day allowed was excessive. This was based upon the cost of hiring in the open market a tug capable of doing the work of the *Integrity*. But by the testimony of petitioner's own witness, it appears that it was materially more economical to work the two tugs overtime than to hire a tug for $150 a day. In view of this testimony, to allow petitioner demurrage at the rate of $150 a day would be to give it much more than was due it, even if any demurrage was allowable.

## CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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OCTOBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

# SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1932.

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| Brooklyn Eastern District Terminal, Petitioner, *vs.* United States of America. | On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit. |

[November 14, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

On September 30, 1920, the dredge Raritan, belonging to the United States, collided in New York harbor with the steam tug Integrity, belonging to the petitioner. A libel in admiralty to recover the damages to the tug was filed by the petitioner in conformity with an act of Congress whereby the United States consented to be sued. Act of February 16, 1925; c. 241, 43 Stat. 1566. A cross-libel for damages to the dredge was filed by the government. The trial court held both vessels at fault, and determined that the damages to each should be equally apportioned between the owners. A Special Commissioner was appointed to ascertain the damages and report.

The controversy hinges upon an item of demurrage. As to the repair bills ($26,114.57 for the Integrity and $2,230 for the Rariton), as well as some other items, the parties are now at one. The conflict between them, once waged along a wider front, has narrowed to a single point. The District Court, confirming the Commissioner's report, allowed demurrage to the petitioner at the rate of $150 a day, the market hire of another tug, during the seventy-eight days when the Integrity was withdrawn for repairs. This item ($11,700) the Circuit Court of Appeals excluded. 54 F. (2d) 978. A writ of certiorari has brought the case here.

The petitioner was in the business of towing car-floats for railroads between points in New York harbor. It did not use its boats for hire generally. Its business was sufficient to occupy three tugs during regular working hours in the transfer of railroad

cars from one point to another. When the Integrity was laid up, the petitioner did not hire an extra tug as a substitute for the one disabled. Instead, it used its two other tugs overtime, and thus kept down the cost while doing business as before. The same crews were employed; but if extra wages were paid, the amount has not been proved. Extra wear and tear there may have been; but there is nothing in the record to indicate how much. Indeed the witness for the petitioner frankly stated that the loss, if any, from that cause was too uncertain to be measured. The award for demurrage allowed by the District Court and disallowed by the Court of Appeals was not made upon the basis of depreciation of the boats in use. It is measured by expenses that in fact never were incurred, but that might have been incurred and charged to the respondent if the necessities of the business had been something other than they were.

Our decision may not overleap the limitations of the record. To dispose of the case before us we do not need to hold that through the use of the other vessels the possibility of all demurrage has been excluded by an inexorable rule of law. Other courts have held in situations not dissimilar that demurrage may be measured by the interest on the capital value tied up in the disabled boat during the term of disability and thus unfruitfully employed. *The Susquehanna,* [1926] A. C. 655, 663, 664; cf. *The Greta Holme,* [1897] A. C. 596. To approve or disapprove that measure is unnecessary here, for the record does not contain the figures that would enable us to apply it. Even now the petitioner is not seeking for a judgment upon that basis, nor indeed upon any other basis than the one adopted at the trial. The question narrows itself to this, whether the full-time hire of an extra boat must be charged to the respondent as damage flowing from the collision when there was no need of such a boat to keep the business going, and none in fact was used or paid for. Is an award upon that basis either erroneous in law or extravagant in fact?

Erroneous and extravagant we think it must be held to be. *The Conqueror,* 166 U. S. 110, 125, 134; *The Susquehanna, supra;* cf. *The North Star,* 151 Fed. 168; *The Wolsum,* 14 F. (2d) 371; *Cuyamel Fruit Co.* v. *Nedland,* 19 F. (2d) 489; *Newtown Creek Towing Co.* v. *City of New York,* 23 F. (2d) 486; *The Glendola,* 47 F. (2d) 206. The disability of a vessel will not sustain de-

murrage at the rate of the value of her hire unless an award at such a rate can be seen to be reasonable when the disability is viewed in the setting of the circumstances. *The Conqueror, supra.* Only when thus enlightened can we choose the yardstick most nicely adjusted to be a measure of reparation, in some instances, no doubt, the hire of another vessel, in other instances, it may be, a return upon the idle capital, (*The Susquehanna, supra*), in others something else. Only then indeed can we know whether the interference with profit or enjoyment is to be ranked as substance or as shadow. The vessel may have been employed in a business of such a nature that for the avoidance of loss there is need of the employment of a substitute. In such circumstances the fair value of the hire may be an element of damage, and this whether the substitute is actually procured or not. Cf. *The Lagonda,* 44 Fed. 367; *The Mediana,* [1900] A. C. 113; *Perkins* v. *Brown,* 132 Tenn 294; *Cook* v. *Packard Motor Car Co.,* 88 Conn. 590. The vessel may be a yacht, employed for pleasure and not for business. Even then, in the judgment of many courts, the value of the use may be considered by the triers of the facts in fixing the recovery if there has been a substantial impairment of that enjoyment for which such vessels are maintained. *The Lagonda, supra; Cook* v. *Packard Motor Car Co., supra; Banta* v. *Standard Motor Co.,* 89 Conn. 51, 56; *Perkins* v. *Brown, supra; Hunt Co.* v. *Boston Elevated Ry. Co.,* 199 Mass. 220, 235, 236; *The Astrakhan,* [1910] P. 172, 181. There are statements in *The Conqueror* (p. 133) that may be in conflict with that view, but they were not essential to the judgment (p. 134), and in the light of later decisions as to the loss of pleasure vehicles are unquestionably in opposition to a strong current of authority. See cases, *supra.* The owner of the Conqueror would not have let his yacht to any one if there had been no occasion to repair her, nor during the season that she was out of service would he have used her for himself. 166 U. S. at p. 134. There was neither interference with profit nor substantial disturbance of enjoyment. The court did not hold that even then there could be no recovery whatever. Cf. *Cook* v. *Packard Motor Car Co., supra,* at p. 596. It held that recovery was excessive when based on the returns of an imaginary letting. We are to have regard in every case to the reasonable probabilities of time and place and circumstance. Demurrage

on the basis of the cost of a substitute, actual or supposititious, may be no more than fair indemnity when gains have been lost or enjoyment seriously disturbed. Demurrage on a like basis may be so extravagant as to outrun the bounds of reason when loss of profit has been avoided without the hire of a substitute and the disturbance of enjoyment has been slight or perhaps fanciful. *The Conqueror, supra.* Cf. *Cook* v. *Packard Motor Car Co., supra,* p. 595; *The Susquehanna,* [1925] P. 196, 207, affirmed [1926] A. C. 655. A wide range of judgment is conceded to the triers of the facts in the choice of the standard to be applied and in the method of applying it. *Cook* v. *Packard Motor Car Co., supra.* The choice, however, may not be arbitrary, nor is the range of judgment without limit. We think that on the face of this award there is declared a principle of assessment that in the setting of the circumstances exceeds the bounds of any discretion allowed to the assessors. In admiralty an appeal to the Court of Appeals is deemed to be a trial *de novo. Munson Steamship Line* v. *Miramar Steamship Co.,* 167 Fed. 960; *Gilchrist* v. *Chicago Ins. Co.,* 104 Fed. 566, 571; cf. *The Abbotsford,* 98 U. S. 440; *Watts, W. & Co.* v. *Unione, &c.,* 248 U. S. 9, 21; *Standard Oil Co.* v. *So. Pacific Co.,* 268 U. S. 146, 155. An assessment of damages may be corrected if erroneous in point of law, but also it may be corrected if extravagant in fact.

The doctrine of the "spare boat" cases is invoked by the petitioner as decisive in its favor, but we think without avail. Shipowners at times maintain an extra or spare boat which is kept in reserve for the purpose of being utilized as a substitute in the contingency of damage to other vessels of the fleet. There are decisions to the effect that in such conditions the value of the use of a boat thus specially reserved may be part of the demurrage. *The Cayuga,* 7 Blatch. 385, affirmed 14 Wall. 270, 278; *The Favorita,* 8 Blatch. 539, affirmed 18 Wall. 598, 603; *New Haven Steamboat Co.* v. *The Mayor,* 36 Fed. 716, 718; *The Emma Kate Ross,* 50 Fed. 845; *The Providence,* 98 Fed. 133. If no such boat had been maintained, another might have been hired, and the hire charged as an expense. The result is all one whether the substitute is acquired before the event or after. The same doctrine has been recognized in the English courts, where a boat thus held in reserve is known as a standby. *The Mediana,* [1900] A. C. 113. In those

courts, however, as in our own, there has been a refusal to extend the doctrine to boats acquired and maintained for the general uses of the business. Just such a state of facts was considered by the House of Lords in *The Susquehanna, supra,* a case hardly to be distinguished from the one at hand. In the speech by Lord Sumner we are told that "the Admiralty by prompt effort and economy in consumption, acting in accordance with their obligation to minimize the damages, managed to get through their work" without the disabled vessel. "They cannot," he continued (p. 663), "get damages based on the use of a standby when in fact they did very well without one."

So here. The petitioner was engaged in an established business using tugs for a single purpose. It had no thought to turn that business into one of a different kind while this tug was out of service. Mindful of the need to minimize the damages, it used to the full its available resources, and was able by special effort to make them do the work. We are unable to accept the argument that the expenses which it saved are to be charged to the respondent as if they had not been saved at all.

The judgment of the Circuit Court of Appeals which modified the judgment of the District Court is accordingly

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*